Supreme Court, U.S.
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In The

Supreme Court of the United States

ANDRA CAPACI,

Petitioner,

v.

FOLMAR KENNER, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question – #1

What good is a trial by jury when the presiding trial judge denies the Petitioner every opportunity to present evidence, even going so far as to disallow her treating physician, as well as other well respected experts, and even Petitioner's own testimony while she was being cross-examined when the trial judge stopped her testimony and dismissed her case with prejudice while at the same time dismissing her *due process rights under the Fourteenth Amendment*? (See last 3 pages of Cross-Examination of Petitioner by Respondent's attorney.)

Question – #2

What good is a trial by jury when the defense attorney is allowed to intentionally mislead the jury, by not being truthful, by taking statements out of context, and by trying to portray the Petitioner as committing fraud with the IRS, and the Petitioner is not allowed to present rebuttal evidence and also to use "the contempt of court" when the word contempt was not mentioned in the trial court and other exaggerations?

QUESTIONS PRESENTED – Continued

Question – #3 Abuse of discretion

Understanding that "Discretion of the Judge" is meant to designate that the judge has the power to rule and decide as his best judgment and sound discretion dictate but is it not an "abuse of that discretion" when the judge rules on a whim or unstable caprice, inconsiderate action, arbitrary will and total lawlessness under the constitution and its articles by disallowing important witnesses (see e-mail in appendix) to testify by not permitting the jury access to beneficial evidence for Petitioner, making improper comments to influence jury, showing bias, making rulings on evidence that deny a person a chance to convey her side and using an exaggerated description of the court behavior of the Petitioner, and imposing harsher sanctions than is the norm such as dismissing a case with prejudice before Petitioner's testimony was completed? (State v. Ferranto, 112 Ohio St. 667, 676-678 (1925)).

Question – #4 Recusal in Due Process

If *due process* requires a judge to recuse himself . . . Not only where there is *proof* a judge is actually biased, but also where an *objective* inquiry establishes a "*probability of bias*" on a judge's part, then why did the trial judge not recuse himself when he said early on that he knew the Respondent? (Caperton v. A.T. Massey Coal Co., 556 U.S. ___ (2009)).

PARTIES TO THE PROCEEDINGS

The Petitioner is: Andra Capaci

The Respondent is: Folmar Kenner, LLC

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceedings iii

Table of Contents iv

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Federal Constitutional and Statutory Provisions Involved 1

Statement of the Case 3

Argument 4

Conclusion 6

Appendix

Supreme Court Opinion ..... App. 1

Court of Civil Appeals Opinion ..... App. 19

Circuit Court Order ..... App. 30

Circuit Court Oral Opinion ..... App. 31

Supreme Court Denial of Rehearing ..... App. 35

Email of Expert Witness ..... App. 37

TABLE OF AUTHORITIES

Page

CASES

Caperton v. A.T. Massey Coal Co., 556 U.S. ___ (2009) ..... ii, 3, 6

State v. Ferranto, 112 Ohio St. 667, 676-678 (1925) ..... ii, 3, 6

STATUTES

28 U.S.C. Section 1257 ..... 1, 3

28 U.S.C. Section 1257a 1, 3

CONSTITUTIONAL PROVISIONS

U.S. Const.

amend. I 1

amend. V 2

amend. XIV 2

U.S. Const. art. III, § 2 2

RULES

Supreme Court Rule 10 2

Supreme Court Rule 12 2

Supreme Court Rule 13 3

Supreme Court Rule 14 3

OPINIONS BELOW

The opinions of the Alabama Supreme Court and Alabama Civil Appeals Court are unpublished, but are attached in the appendix.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on January 22, 2010.

The jurisdiction of this court rests upon 28 U.S.C. Section 1257 (Courts of our Dual Judicial System). 28 U.S.C. Section 1257a provides that the U.S. Supreme Court may review cases from the highest court of a state.

FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution reads in relevant part: "Congress shall make no law . . . abridging the right of the people . . . to petition the government for a redress of grievances."

2. The First Amendment to the United States Constitution reads in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . "

3. The First Amendment to the United States Constitution reads in relevant part: "Congress shall

make no law . . . abridging . . . the right of people peaceably to assemble . . . "

4. The Fifth Amendment to the United States Constitution reads in relevant part: "No person shall be . . . deprived of liberty, or property, without due process of law . . . "

5. The Fourteenth Amendment to the United States Constitution reads in relevant part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

6. Article III of the Constitution in Section 2 reads in relevant part: "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, the Treaties made, or which shall be made, under their Authority . . . "

Rules:

Rule 10. Considerations Governing Review on Writ of Certiorari

Rule 12. Review on Certiorari: How Sought; Parties

Rule 13. Review on Certiorari: Time for Petitioning

Rule 14. Content of a Petition for a Writ of Certiorari

Cases and Statutes:

Caperton v. A.T. Massey Coal Co., 566 U.S. ___ (2009)

State v. Ferranto, 112 Ohio St. 667, 676-678 (1925)

28 U.S.C. Section 1257 (Courts of our Dual Judicial System) 28 U.S.C. Section 1257a

STATEMENT OF THE CASE

This action was initiated by Counterclaimant-Defendant-Respondent Folmar Kenner, LLC ("Folmar") against Counterclaimant-Petitioner Andra Capaci d/b/a Andra Capaci Real Estate ("Capaci") for breach of shopping center lease. (C.1). Capaci counterclaimed for breach of the covenant of quiet enjoyment and constructive eviction. (C.4). In particular, Capaci alleged breach of contract, negligence and willfulness in the failure of the landlord Folmar to properly construct and maintain the premises, resulting in the growth and proliferation of toxic mold, causing her bodily injury damage and forcing her to vacate the premises to incur extra expenses and cost in doing so. (C.28-29).

The claims of Folmar against Capaci were ultimately settled before trial by Capaci's liability insurer. (C.971). Trial on Capaci's counterclaims commenced on February 6, 2007. (C.1649). Near the close of the fourth day of trial, Ms. Capaci was testifying on the stand. After several warnings to keep her answers responsive to the questions, the court terminated her testimony, terminated the trial, and sua sponte dismissed Capaci's counterclaims with prejudice. (R.644; C.1507).

An order dismissing the counterclaims and entering judgment for Folmar was entered on March 21, 2007. (C.1507). Costs were taxed against Capaci. (*Id.*) A motion for new trial or to alter or amend the judgment was filed on April 27, 2007 (C.1511), and was denied on April 25, 2007. (C.1617). A timely notice of appeal was thereafter filed on May 2, 2007. (C.1618).

ARGUMENT

Question 1

Petitioner was not able to experience a fair trial due to the actions of the trial judge. His very impatience and harsh tonality only served to make this Petitioner extremely nervous, but never wilful or contumacious. A reading of the record, especially the last three pages of the Cross-Examination by the Respondent's attorney would illustrate a Petitioner who tried hard to FOCUS but was unable to. Petitioner would simply forget to try not to explain her

answers. The word, "contempt" was never used by the trial judge. Petitioner was never accused of contempt nor was her conduct questioned, but, rather, of not answering the way the judge wanted. Yet, the Supreme Court of Alabama in their Opinion refer to Petitioner as having contempt of court. The trial judge deprived me the opportunity to present my evidence to the jury and to recover my damages which were estimated to be between $500,000 and $700,000. The cost of this lawsuit has also been a hardship on Petitioner, and thus the reason for pro se.

Question 2

The defense attorney was given free rein by the judge to do whatever he pleased. His questions to Petitioner were argumentative, based on lies and deceit. He tried to discredit the Petitioner's credibility by telling the jury prior to questioning the Petitioner that he was going to prove she committed fraud with the IRS. This remark was untrue.

Question 3

The trial court's involuntary dismissal with prejudice in this action was an abuse of discretion. His ruling was harsh and unusual. The inconsiderate action of the judge can be further illustrated by an e-mail (the day after his testimony) from my expert witness, Dr. Lipsey. The judge also had no regard for the Constitution and its articles by disallowing important witnesses to testify, by not permitting the jury access to beneficial evidence for Petitioner,

making improper comments to influence the jury, showing extreme bias, making rulings on evidence that deny a person a chance to convey her side, and allowing the defense attorney to be unfair in his questioning of Petitioner's expert witness and also the Petitioner herself. This judge also imposed harsher sanctions than is the norm by dismissing a case with prejudice before Petitioner's testimony was completed? (State v. Ferranto, 112 Ohio St. 667, 676-678 (1925)).

Question 4

Due process requires a judge to recuse himself. . . . Not only where there is proof a judge is actually biased, but also where an objective inquiry establishes a "*probability of bias*" on a judge's part. Since this trial judge said in the very beginning of the trial that he knew the Respondent he should have stepped down and recused himself. It is a violation of due process for this judge to force an outcome of this trial for his friend. (Caperton v. A.T. Massey Coal Co., 566 U.S. ___ (2009)).

CONCLUSION

Petitioner, Andra Capaci, a 71-year-old female resident of Louisiana, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Alabama in this case.

In plain contravention of the requirements of the Constitution of the United States and Federal Laws, the state Supreme Court of Alabama has embarked on an ad hoc standardless, and lawless exercise of judicial power which appears designed to thwart the very rules and laws of this country.

Because one and all are governed directly by the Constitution, the Alabama's court decision involves issues of the utmost federal importance. Due to the Respondent's attorney's false and baseless allegations, his exaggerations against Petitioner and by the lower Circuit Court Judge's blatant abuse of discretion by not allowing Petitioner her day in court thereby impeding Capaci's constitutional rights of due process.

Upon reconsideration and review the Petitioner respectfully requests that the Supreme Court will have the final decision in granting her relief, however they see appropriate.

Respectfully submitted,

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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2009

1070824

Ex parte Folmar Kenner, LLC

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(Filed Sep. 18, 2009)

(In re: Andra Capaci d/b/a Andra Capaci Real Estate

v.

Folmar Kenner, LLC)

(Mobile Circuit Court, CV-04-2311; Court of Civil Appeals, 2060846)

PER CURIAM.

Folmar Kenner, LLC, petitioned this Court for a writ of certiorari to review the Court of Civil Appeals' decision reversing the trial court's sua sponte dismissal, with prejudice, under Rule 41(b), Ala. R. Civ. P., of the counterclaims filed against Folmar Kenner by Andra Capaci, doing business as Andra Capaci Real Estate. See *Andra Capaci d/b/a Andra Capaci Real Estate v. Folmar Kenner, LLC*, [Ms. 2060846, March 7, 2008] ___ So. 3d ___ (Ala. Civ. App. 2008). We granted certiorari review to consider, as a material question of first impression, whether the trial court exceeded its discretion by dismissing Capaci's counterclaims with prejudice under Rule 41(b), Ala. R. Civ. P., for failing to follow its orders during trial. See Rule 39(a)(1)(C), Ala. R. App. P. For the following reasons, we reverse the Court of Civil Appeals' judgment.

Facts and Procedural History

In its opinion, the Court of Civil Appeals summarized the relevant procedural history and undisputed facts:

> "Folmar Kenner, LLC, sued Andra Capaci, doing business as Andra Capaci Real Estate, seeking damages on claims related to Capaci's alleged breach of a lease agreement. Capaci answered and counterclaimed, alleging that the leased premises were unfit for occupancy and seeking damages on several

claims, including negligence, wantonness, and breach of the lease agreement.

"The dispute between the parties arose after Capaci discovered that the leased premises were infested with mold and she vacated the premises. Folmar Kenner remedied or attempted to remedy the mold problem, but some of Capaci's personal property that she had left in the premises was damaged in the process. Although Folmar Kenner represented that it was safe for Capaci to return to the leased premises after it had performed its remedial measures, Capaci refused to do so. Folmar Kenner then claimed that Capaci had breached the lease agreement. Capaci claimed that she had suffered physical injury and emotional distress as a result of her exposure to toxic mold. She also sought to recover the value of the personal property that she alleged Folmar Kenner had damaged during its attempts to remedy the mold problem in the leased premises.

"On July 27, 2006, Folmar Kenner filed an offer of judgment pursuant to Rule 68, Ala. R. Civ. P., in the amount of $25,000. Capaci did not accept that offer. On January 8, 2007, the parties filed a joint motion indicating that Folmar Kenner's claims against Capaci had been settled; the parties moved for a dismissal of those claims. The record contains no indication that the trial court ruled on that motion, but the parties represented to the trial court at the start of the

trial that those claims had been settled, and those claims were not prosecuted at the trial.

"The case proceeded to a jury trial solely on Capaci's counterclaims against Folmar Kenner. On February 28, 2007, the fourth day of the jury trial, Capaci testified. During her responses on direct examination, Capaci repeatedly volunteered information beyond that sought by the questions. Folmar Kenner objected repeatedly to answers Capaci gave, arguing that Capaci's responses to questions asked of her exceeded the scope of the question that had been asked. During her direct examination, the trial court warned Capaci that if she continued to volunteer information, it would 'terminate [her] testimony.'

"The cross-examination of Capaci by Folmar Kenner was contentious at times. Folmar Kenner repeatedly objected to Capaci's elaborating or expanding her answers to provide information beyond that which was necessary to properly respond to the questions. The trial court continued to warn Capaci to limit her responses to the questions actually asked. The trial court also explained to Capaci that her attorney could ask her additional questions on redirect examination so that she could fully explain the answers she gave on cross-examination. However, despite the repeated warnings, Capaci continued to volunteer information and expound on her answers.

"The trial court then warned Capaci again, telling her that that warning was the last one it would give and that '[t]his trial will end the next time you volunteer an answer that is not requested by the question.' In response, Capaci, as she had done several times before, told the trial court that she was nervous testifying in court.

"In spite of its statement that it would no longer warn Capaci, the trial court continued to do so several more times during her cross-examination. Then, when Capaci continued to explain her answers and volunteer information, the trial court dismissed the jury and ended the trial. After the jury had been dismissed, the trial court stated:

> "'I think I gave Ms. Capaci every leeway I could possibly give, perhaps maybe too much. She continually disregarded my instructions to respond to the questions. I hereby dismiss the case with prejudice, costs attached to the plaintiff on this matter.'"

Capaci, ___ So. 3d at ___.

The Court of Civil Appeals then set forth the standard of review of a trial court's decision to dismiss an action with prejudice under Rule 41(b), Ala. R. Civ. P.:

"This court, in discussing dismissals pursuant to Rule 41(b), has stated:

"'Rule 41(b), Ala. R. Civ. P., permits a trial court to dismiss an action when a plaintiff fails to prosecute that action or fails to comply with the Rules of Civil Procedure or orders of the court. . . . Typically, an appellate court will review a dismissal pursuant to Rule 41(b) to determine only whether the trial court abused its discretion. *Riddlesprigger [v. Ervin],* 519 So. 2d [486,] 487 [(Ala. 1987)].

"'"However, since dismissal with prejudice is a drastic sanction, it is to be applied only in extreme situations," and "appellate courts will carefully scrutinize such orders and occasionally will find it necessary to set them aside." *Smith v. Wilcox County Bd. of Educ.,* 365 So. 2d 659, 661 (Ala. 1978) (citing, among other things, 9 Wright & Miller, Federal Practice & Procedure § 2370, p. 203, n. 1). Our supreme court has explained that "the plaintiff's conduct must mandate the dismissal," and it has further reiterated the rule espoused by the United States Court of Appeals for the Fifth Circuit that a trial court "may dismiss with prejudice an action 'only in the face of a clear record of delay or contumacious conduct by the plaintiff.'" *Smith,* 365 So. 2d at 661 (quoting *Durham v.*

> *Florida East Coast Ry. Co.*, 385 F.2d 366, 368 (5th Cir. 1967))."
>
> "*Kendrick v. Earl's, Inc.*, 987 So. 2d 589, 592-93 (Ala. Civ. App. 2007)."

Capaci, ___ So. 3d at ___.

Before the Court of Civil Appeals, Capaci argued that the evidence did not support a finding that her conduct during her testimony was willful or contumacious, and she argued that the trial court could have imposed a lesser sanction than the dismissal of her counterclaims with prejudice. The Court of Civil Appeals agreed with Capaci. It reversed the trial court's dismissal of Capaci's counterclaims, holding as follows:

> "We must conclude that under the facts of this case the trial court erred in dismissing Capaci's claims with prejudice. Although Capaci repeatedly elaborated or gave irrelevant testimony, she also repeatedly communicated her anxiety about testifying. We recognize the difficult job of the trial court in dealing with noncompliant witnesses or parties. A trial court certainly may take measures necessary to maintain order in its courtroom. In fact, with regard to the specific facts of this case, we agree with the trial court that Capaci's failure to heed the trial court's warnings warranted some form of sanction. However, the trial court had available to it other, less drastic alternatives in enforcing its orders. Those less drastic sanctions included, but were not limited to,

> ending Capaci's testimony, striking her testimony in its entirety, ending her presentation of evidence and submitting the matter immediately to the jury, or finding her in contempt.
>
> "We recognize and sympathize with the trial court's frustration over Capaci's behavior. Conduct such as that exhibited by Capaci is not to be condoned. The trial court was well within its power to take action to sanction Capaci for disobeying its orders in its courtroom. However, given the totality of the evidence, we conclude that Capaci's conduct did not rise to the level that would warrant the extreme sanction of a dismissal with prejudice of her claims; in other words, her conduct did not '"mandate dismissal."' *Hosey v. Lowery,* 911 So. 2d [15,] 17 [(Ala. Civ. App. 2005)]."

Capaci, ___ So. 3d at___. Folmar Kenner then petitioned this Court for certiorari review of the Court of Civil Appeals' decision. We reverse and remand.

Standard of Review

The trial court's action in dismissing Capaci's counterclaims was apparently based on its finding of contempt for Capaci's failure to adhere to the court's repeated orders instructing Capaci to confine her answers to the questions posed by counsel during her testimony. The trial court's conclusion as to the credibility of the excuse proffered by Capaci for disregarding those instructions is therefore presumed

correct. See *Gilbert v. Nicholson*, 845 So. 2d 785, 791 (Ala. 2002) ("When evidence in a contempt case is presented ore tenus to the trial court, the trial court's finding regarding contempt is presumed correct."). A finding of contempt is "'"a determination committed to the sound discretion of the trial court, and, absent an abuse of that discretion or unless the judgment of the trial court is unsupported by the evidence so as to be plainly and palpably wrong, this court will affirm."'" *S.A.T. v. E.D.*, 972 So. 2d 804, 809 (Ala. Civ. App. 2007) (quoting *Nave v. Nave*, 942 So. 2d 372, 377 (Ala. Civ. App. 2005), quoting in turn *Stack v. Stack*, 646 So. 2d 51, 56 (Ala. Civ. App. 1994)).

Discussion

The controlling issue of law is whether the trial court exceeded its discretion in dismissing Capaci's counterclaims with prejudice under Rule 41(b), Ala. R. Civ. P. Folmar Kenner contends that Capaci's "testimonial misconduct" justified the trial court's actions because, it says, her misconduct was willful and contumacious. Folmar Kenner also contends that no lesser sanctions were available to the trial court that would have promoted a fair and just adjudication of Capaci's claims against Folmar Kenner. Capaci maintains that her conduct was neither willful nor contumacious.

As the Court of Civil appeals noted, the factual situation presented in this case is novel:

> "Most of the cases that address the sanction of a Rule 41(b) dismissal involve situations in which a party purportedly has failed to prosecute his or her action or has failed to comply with pretrial orders. *See Jones v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 604 So. 2d 332, 341 (Ala. 1991) (affirming a dismissal with prejudice when the plaintiff had failed to comply with previous court orders and had initiated another round of litigation); *Burdeshaw v. White*, 585 So. 2d 842 (Ala. 1991) (reversing a dismissal with prejudice when the plaintiff's conduct did not show a willful or contumacious failure to prosecute the action); *Henderson v. G & G Corp.*, 582 So. 2d 529 (Ala. 1991) (the evidence supported a dismissal with prejudice for failure to prosecute the action); *Cabaniss v. Wilson*, 501 So. 2d 1177 (Ala. 1986) (the evidence did not support a dismissal with prejudice for failure to prosecute the action); *Kendrick v. Earl's, Inc.*, supra (reversing dismissal judgments when there were insufficient bases for those judgments); *Harris v. Cleveland*, 979 So. 2d 78 (Ala. Civ. App. 2007) (reversing a dismissal with prejudice for failure to prosecute when the evidence did not support such a drastic sanction); *Hosey v. Lowery*, 911 So. 2d 15 (Ala. Civ. App. 2005) (dismissal with prejudice was too extreme a sanction for counsel's failure to appear at a hearing); *State ex rel. S.M. v. A.H.*,

> 832 So. 2d 79 (Ala. Civ. App. 2002) (reversing a dismissal with prejudice when the evidence did not support a finding that there had been a willful or contumacious delay in prosecuting the action); and *Goodley v. Standard Furniture Mfg. Co.*, 716 So. 2d 226, 227 (Ala. Civ. App. 1998) (the failure to appear at a hearing did not warrant a dismissal with prejudice '[b]ecause the record reveal[ed] no delay, willful default, or contumacious conduct'). *See also Weatherly v. Baptist Med. Ctr.*, 392 So. 2d 832 (Ala. 1981) (reversing a dismissal with prejudice under Rule 37, Ala. R. Civ. P., when the evidence did not support a determination that the plaintiff had willfully failed to respond to interrogatories). It does not appear from the research conducted by this court that the dismissal of claims due to a failure to comply with court rulings during a trial has been previously addressed or sanctioned by our courts."

Capaci, ___ So. 3d at ___. Although the factual situation presented by this case may be novel, the rules concerning the trial court's power to dismiss a case with prejudice under Rule 41(b) are well established.

Rule 41(b), Ala. R. Civ. P., states, in pertinent part:

> "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this

> subdivision . . . operates as an adjudication upon the merits."

Concerning the scope of Rule 41(b), this Court held in *Riddlesprigger v. Ervin,* 519 So. 2d 486 (Ala. 1987):

> "Rule 41(b) has been construed to mean that a trial court has the inherent power to dismiss a cause for want of prosecution or for failure to comply with court rules or orders. *Ryder Int'l Corp. v. State,* 439 So. 2d 162 (Ala. Civ. App. 1983). *Accord, Link v. Wabash R.R.,* 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962). Such a dismissal is generally considered to be within the sound discretion of the trial court and will be reversed on appeal only for an abuse of that discretion. *Whitehead v. Baranco Color Labs, Inc.,* 355 So. 2d 376 (Ala. Civ. App. 1978). It need only be determined, upon appellate review of a trial court's action under Rule 41(b), whether the ruling is supported by the evidence. *Strickland v. National Gypsum Co.,* 348 So. 2d 497 (Ala. Civ. App. 1977); *Nettles v. First Nat'l Bank,* 388 So. 2d 916 (Ala. 1980).
>
> ". . . .
>
> "As this Court has heretofore observed:
>
> "'In Alabama, and many federal courts, the interest in disposing of the litigation on the merits is overcome and a dismissal may be

> granted when there is a *clear record of delay, willful default or contumacious conduct by the plaintiff. Smith v. Wilcox County Board of Education,* 365 So. 2d [659] at 661 [(Ala. 1978)]. See, e.g., *Boazman v. Economics Laboratory, Inc.,* 537 F.2d 210 (5th Cir. 1976); *Pond v. Braniff Airways,* 453 F.2d 347 (5th Cir. 1972). Willful default or conduct is a conscious or intentional failure to act. *Welsh v. Automatic Poultry Feeder Co.,* 439 F.2d 95 (8th Cir. 1971). "Willful" is used in contradistinction to accidental or involuntary noncompliance. No wrongful motive or intent is necessary to show willful conduct.'
>
> "*Selby v. Money,* 403 So. 2d 218, 220 (Ala. 1981)."

519 So. 2d at 487-88. Further, this Court has held that "[b]ecause the trial judge is in the best position to assess the conduct of the plaintiff and the degree of noncompliance, his decision to grant a motion to dismiss for failure to prosecute will be accorded considerable weight by a reviewing court." *Jones v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 604 So. 2d 332, 341 (Ala. 1991) (citations omitted).

In reversing the trial court's judgment of dismissal, the Court of Civil Appeals failed to follow the well established rule that it acknowledged in its opinion: "The determination of whether a party's

conduct was willful or contumacious is within the trial court's discretion. 'Because the trial judge is in the best position to assess the conduct of the plaintiff and the degree of noncompliance, his decision to grant a motion to dismiss . . . will be accorded considerable weight. . . .'" *Capaci*, ___ So. 3d at ___ (quoting *Jones*, 604 So. 2d at 341). The Court of Civil Appeals recognized the trial court's inherent power to dismiss a case under Rule 41(b), Ala. R. Civ. P., given the trial court's numerous warnings and orders to Capaci while she was testifying and Capaci's demonstrated disregard for those warnings and orders. However, the Court of Civil Appeals, after considering the "totality of the evidence," held that

> "under the facts of this case the trial court erred in dismissing Capaci's claims with prejudice. Although Capaci repeatedly elaborated or gave irrelevant testimony, she also repeatedly communicated her anxiety about testifying."

Capaci, ___ So. 3d at ___.

The Court of Civil Appeals substituted its judgment for that of the trial court when, based on Capaci's testimony that she was nervous about testifying, it concluded that Capaci's conduct was not sufficiently willful or contumacious to mandate the dismissal of her counterclaims with prejudice. In so doing, the Court of Civil Appeals, instead of simply reviewing the record to determine if the trial court's actions were supported by the evidence, appropriated

the trial court's inherent power to dismiss a case for failure to comply with its orders.

The Court of Civil Appeals did not hold that the record was void of evidence to support the trial court's holding that Capaci's conduct was willful or contumacious; in fact, the record contains evidence that supports the trial court's holding. The Court of Civil Appeals recognized the trial court's numerous orders to Capaci to refrain from elaborating or expanding her answers beyond that necessary to properly respond to the questions posed by counsel and recognized the trial court's warnings to Capaci regarding the potential consequences of her persistent misconduct: "the trial court warned Capaci that if she continued to volunteer information, it would 'terminate [her] testimony,'" ___ So. 3d at ___; "[t]he trial court continued to warn Capaci to limit her responses to the questions actually asked," ___ So. 3d at ___; "[h]owever, despite the repeated warnings, Capaci continued to volunteer information and expound her answers," ___ So. 3d at ___; "[t]he trial court then warned Capaci again, telling her that that warning was the last one it would give and that '[t]his trial will end the next time you volunteer an answer that is not requested by the question,'" ___ So. 3d at ___; "[i]n spite of its statement that it would no longer warn Capaci, the trial court continued to do so several more times during her cross-examination," ___ So. 3d at ___; and "the trial court did warn Capaci of the potential consequences of her conduct," ___ So. 3d at ___. Further, the Court of Civil Appeals found that

Capaci had unquestionably refused to follow the trial court's orders during trial and that such misconduct merited some form of sanction. ___ So. 3d at ___. Capaci's conduct could certainly be considered "willful," as this Court has defined that term. There is evidence to support the trial court's holding that Capaci consciously, as opposed to accidentally or involuntarily, failed to follow the trial court's repeated orders. Moreover, Capaci's motive or intent is inconsequential to a determination that she acted willfully. See *Selby v. Money,* 403 So. 2d 218, 220 (Ala. 1981).

However, based solely on Capaci's testimony that she was nervous about testifying, the Court of Civil Appeals disregarded the trial court's determination that Capaci's conduct was willful or contumacious and made its own determination, from a cold record, that her conduct was neither willful nor contumacious. In doing so, the Court of Civil Appeals disregarded the well established principle that the trial court is far better situated than is an appellate court to determine whether Capaci's conduct was willful or contumacious because the trial court has the advantage of personally observing the witness's testimony and is not confined to a removed reading of a cold record. See *Bentley Sys., Inc. v. Intergraph Corp.,* 922 So. 2d 61, 81 (noting that a trial court has a distinct advantage over an appellate court in making determinations based on testimony because it can see and hear the witness firsthand as the witness testifies and can question the witness if necessary). Therefore, we conclude that the trial court did not exceed

its discretion in dismissing with prejudice Capaci's counterclaims under Rule 41(b), Ala. R. Civ. P.

We conclude that the record supports the trial court's decision to dismiss Capaci's counterclaims with prejudice under Rule 41(b), Ala. R. Civ. P., and, thus, that the trial court did not exceed its discretion in doing so. In substituting its judgment for that of the trial court's, the Court of Civil Appeals did not give the trial court's judgment the proper deference. Therefore, we reverse the Court of Civil Appeals' judgment holding that the trial court exceeded its discretion in dismissing Capaci's counterclaims.

It is also necessary to remand this case to the Court of Civil Appeals for further proceedings consistent with this opinion. The Court of Civil Appeals stated in its opinion that "Capaci raises several [other] arguments [concerning the taxation of court costs] on appeal," but it found "the dispositive issue to be whether the trial court erred in dismissing with prejudice her claims against Folmar Kenner." *Capaci*, ___ So. 3d at ___. Ultimately, the Court of Civil Appeals held in its conclusion that "[b]ecause we find Capaci's argument on [the dismissal-with-prejudice] issue to be dispositive, we pretermit discussion of the other issues [concerning the taxation of court costs] raised by Capaci in her appellate brief." *Id.* at ___. Therefore, the Court of Civil Appeals must now address those other issues.

Conclusion

Based on the foregoing, the judgment of the Court of Civil Appeals is reversed and the case remanded to the Court of Civil Appeals for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Cobb, C.J., and Lyons, Woodall, Stuart, Smith, Bolin, Parker, Murdock, and Shaw, JJ., concur.

Notice: This opinion is subject to formal revision before publication in the advance sheets of ***Southern Reporter***. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in ***Southern Reporter***.

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2007-2008

2060846

Andra Capaci d/b/a
Andra Capaci Real Estate

v.

Folmar Kenner, LLC

Appeal from Mobile Circuit Court
(CV-04-2311)

(Filed Mar. 7, 2008)

THOMPSON, Presiding Judge.

Folmar Kenner, LLC, sued Andra Capaci, doing business as Andra Capaci Real Estate, seeking damages on claims related to Capaci's alleged breach of a lease agreement. Capaci answered and counterclaimed, alleging that the leased premises were unfit

for occupancy and seeking damages on several claims, including negligence, wantonness, and breach of the lease agreement.

The dispute between the parties arose after Capaci discovered that the leased premises were infested with mold and she vacated the premises. Folmar Kenner remedied or attempted to remedy the mold problem, but some of Capaci's personal property that she had left in the premises was damaged in the process. Although Folmar Kenner represented that it was safe for Capaci to return to the leased premises after it had performed its remedial measures, Capaci refused to do so. Folmar Kenner then claimed that Capaci had breached the lease agreement. Capaci claimed that she had suffered physical injury and emotional distress as a result of her exposure to toxic mold. She also sought to recover the value of the personal property that she alleged Folmar Kenner had damaged during its attempts to remedy the mold problem in the leased premises.

On July 27, 2006, Folmar Kenner filed an offer of judgment pursuant to Rule 68, Ala. R. Civ. P., in the amount of $25,000. Capaci did not accept that offer. On January 8, 2007, the parties filed a joint motion indicating that Folmar Kenner's claims against Capaci had been settled; the parties moved for a dismissal of those claims. The record contains no indication that the trial court ruled on that motion, but the parties represented to the trial court at the start of the trial that those claims had been settled, and those claims were not prosecuted at the trial.

The case proceeded to a jury trial solely on Capaci's counterclaims against Folmar Kenner. On February 28, 2007, the fourth day of the jury trial, Capaci testified. During her responses on direct examination, Capaci repeatedly volunteered information beyond that sought by the questions. Folmar Kenner objected repeatedly to answers Capaci gave, arguing that Capaci's responses to questions asked of her exceeded the scope of the question that had been asked. During her direct examination, the trial court warned Capaci that if she continued to volunteer information, it would "terminate [her] testimony."

The cross-examination of Capaci by Folmar Kenner was contentious at times. Folmar Kenner repeatedly objected to Capaci's elaborating or expanding her answers to provide information beyond that which was necessary to properly respond to the questions. The trial court continued to warn Capaci to limit her responses to the questions actually asked. The trial court also explained to Capaci that her attorney could ask her additional questions on redirect examination so that she could fully explain the answers she gave on cross-examination. However, despite the repeated warnings, Capaci continued to volunteer information and expound on her answers.

The trial court then warned Capaci again, telling her that that warning was the last one it would give and that "[t]his trial will end the next time you volunteer an answer that is not requested by the question." In response, Capaci, as she had done

several times before, told the trial court that she was nervous testifying in court.

In spite of its statement that it would no longer warn Capaci, the trial court continued to do so several more times during her cross-examination. Then, when Capaci continued to explain her answers and volunteer information, the trial court dismissed the jury and ended the trial. After the jury had been dismissed, the trial court stated:

> "I think I gave Ms. Capaci every leeway I could possibly give, perhaps maybe too much. She continually disregarded my instructions to respond to the questions. I hereby dismiss the case with prejudice, costs attached to the plaintiff on this matter."

Before the trial court had entered a judgment on its February 28, 2007, oral ruling, Folmar Kenner filed a motion seeking to tax the costs of the action against Capaci. In that motion, Folmar Kenner cited Rule 54, Ala. R. Civ. P., and Rule 68, Ala. R. Civ. P. On March 21, 2007, the trial court entered a judgment dismissing Capaci's counterclaims with prejudice and ordering that costs be taxed against her. Capaci filed a postjudgment motion, arguing that the trial court had erred in dismissing her claims and in ordering that she pay the costs of the action. The trial court denied Capaci's postjudgment motion, and Capaci timely appealed. The supreme court transferred the appeal to this court pursuant to § 12-2-7, Ala. Code 1975.

Capaci raises several arguments on appeal. We find the dispositive issue to be whether the trial court erred in dismissing with prejudice her claims against Folmar Kenner. Pursuant to Rule 41(b), Ala. R. Civ. P., a trial court may dismiss a party's claims "[f]or failure . . . to prosecute or to comply with these rules or any order of court," and a dismissal under Rule 41(b) "operates as an adjudication upon the merits."

This court, in discussing dismissals pursuant to Rule 41(b), has stated:

> "Rule 41(b), Ala. R. Civ. P., permits a trial court to dismiss an action when a plaintiff fails to prosecute that action or fails to comply with the Rules of Civil Procedure or orders of the court. . . . Typically, an appellate court will review a dismissal pursuant to Rule 41(b) to determine only whether the trial court abused its discretion. *Riddlesprigger[v. Ervin],* 519 So. 2d [486,] 487 [(Ala. 1987)].
>
> "'However, since dismissal with prejudice is a drastic sanction, it is to be applied only in extreme situations,' and 'appellate courts will carefully scrutinize such orders and occasionally will find it necessary to set them aside.' *Smith v. Wilcox County Bd. of Educ.,* 365 So. 2d 659, 661 (Ala. 1978) (citing, among other things, 9 Wright & Miller, *Federal Practice & Procedure* § 2370, p. 203, n. 1). Our supreme court has explained that 'the plaintiff's conduct must mandate the dismissal,' and it has further reiterated the rule espoused by the United States Court of

> Appeals for the Fifth Circuit that a trial court 'may dismiss with prejudice an action "only in the face of a clear record of delay or contumacious conduct by the plaintiff."' *Smith,* 365 So. 2d at 661 (quoting *Durham v. Florida East Coast Ry. Co.,* 385 F.2d 366, 368 (5th Cir. 1967))."

Kendrick v. Earl's, Inc., [Ms. 2060719, Dec. 14, 2007] ___ So. 2d ___, ___ (Ala. Civ. App. 2007).

Most of the cases that address the sanction of a Rule 41(b) dismissal involve situations in which a party purportedly has failed to prosecute his or her action or has failed to comply with pretrial orders. *See Jones v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 604 So. 2d 332, 341 (Ala. 1991) (affirming a dismissal with prejudice when the plaintiff had failed to comply with previous court orders and had initiated another round of litigation); *Burdeshaw v. White,* 585 So. 2d 842 (Ala. 1991) (reversing a dismissal with prejudice when the plaintiff's conduct did not show a willful or contumacious failure to prosecute the action); *Henderson v. G & G Corp.,* 582 So. 2d 529 (Ala. 1991) (the evidence supported a dismissal with prejudice for failure to prosecute the action); *Cabaniss v. Wilson,* 501 So. 2d 1177 (Ala. 1986) (the evidence did not support a dismissal with prejudice for failure to prosecute the action); *Kendrick v. Earl's, Inc.*, supra (reversing dismissal judgments when there were insufficient bases for those judgments); *Harris v. Cleveland,* [Ms. 2060629, Aug. 3, 2007] ___ So. 2d ___ (Ala. Civ. App. 2007) (reversing a dismissal

with prejudice for failure to prosecute when the evidence did not support such a drastic sanction); *Hosey v. Lowery*, 911 So. 2d 15 (Ala. Civ. App. 2005) (dismissal with prejudice was too extreme a sanction for counsel's failure to appear at a hearing); *State ex rel. S.M. v. A.H.*, 832 So. 2d 79 (Ala. Civ. App. 2002) (reversing a dismissal with prejudice when the evidence did not support a finding that there had been a willful or contumacious delay in prosecuting the action); and *Goodley v. Standard Furniture Mfg. Co.*, 716 So. 2d 226, 227 (Ala. Civ. App. 1998) (the failure to appear at a hearing did not warrant a dismissal with prejudice "[b]ecause the record reveal[ed] no delay, willful default, or contumacious conduct"). *See also Weatherly v. Baptist Med. Ctr.*, 392 So. 2d 832 (Ala. 1981) (reversing a dismissal with prejudice under Rule 37, Ala. R. Civ. P., when the evidence did not support a determination that the plaintiff had willfully failed to respond to interrogatories). It does not appear from the research conducted by this court that the dismissal of claims due to a failure to comply with court rulings during a trial has been previously addressed or sanctioned by our courts.

In her brief on appeal, Capaci argues, among other things, that the evidence does not support a conclusion that her conduct during her testimony was willful or contumacious, and she contends that the trial court could have chosen a less drastic sanction than the dismissal of her claims with prejudice.

The record clearly indicates that Capaci did not comply with the trial court's orders to confine her

answers to the questions asked of her. Although the trial court did warn Capaci of the potential consequences of her conduct, it warned her that it would either terminate her testimony or end the trial; the trial court did not indicate that it was considering the dismissal of Capaci's claims, and Folmar Kenner did not move for such a ruling. Also, Capaci's statements made after the trial court's warnings indicated that those warnings made Capaci increasingly nervous, which seemed to have exacerbated her tendency to elaborate in her testimony.

The determination of whether a party's conduct was willful or contumacious is within the trial court's discretion. "Because the trial judge is in the best position to assess the conduct of the plaintiff and the degree of noncompliance, his decision to grant a motion to dismiss for failure to prosecute will be accorded considerable weight by a reviewing court." *Jones v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 604 So. 2d at 341 (citing *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 947 (9th Cir. 1976), and *Von Poppenheim v. Portland Boxing & Wrestling Comm'n*, 442 F.2d 1047, 1051 (9th Cir. 1971)). However, the dismissal of a party's claim with prejudice is a drastic sanction that should be used only in extreme situations. *Burdeshaw v. White*, 585 So. 2d at 847. Further, "'[d]ismissal orders must be carefully scrutinized, and the plaintiff's conduct must mandate dismissal.'" *Hosey v. Lowery*, 911 So. 2d at 17 (quoting *Iverson v. Xpert Tune, Inc.*, 553 So. 2d 82, 87 (Ala. 1989)).

We must conclude that under the facts of this case the trial court erred in dismissing Capaci's claims with prejudice. Although Capaci repeatedly elaborated or gave irrelevant testimony, she also repeatedly communicated her anxiety about testifying. We recognize the difficult job of the trial court in dealing with noncompliant witnesses or parties. A trial court certainly may take measures necessary to maintain order in its courtroom. In fact, with regard to the specific facts of this case, we agree with the trial court that Capaci's failure to heed the trial court's warnings warranted some form of sanction. However, the trial court had available to it other, less drastic alternatives in enforcing its orders. Those less drastic sanctions included, but were not limited to, ending Capaci's testimony, striking her testimony in its entirety, ending her presentation of evidence and submitting the matter immediately to the jury, or finding her in contempt.

We recognize and sympathize with the trial court's frustration over Capaci's behavior. Conduct such as that exhibited by Capaci is not to be condoned. The trial court was well within its power to take action to sanction Capaci for disobeying its orders in its courtroom. However, given the totality of the evidence, we conclude that Capaci's conduct did not rise to the level that would warrant the extreme sanction of a dismissal with prejudice of her claims; in other words, her conduct did not "'mandate dismissal.'" *Hosey v. Lowery,* 911 So. 2d at 17.

Because we find Capaci's argument on this issue to be dispositive, we pretermit discussion of the other issues raised by Capaci in her appellate brief.

REVERSED AND REMANDED.

Pittman, Thomas, and Moore, JJ., concur.

Bryan, J., dissents, with writing.

BRYAN, Judge, dissenting.

As the main opinion acknowledges, "[t]he determination of whether a party's conduct was willful or contumacious is within the trial court's discretion" because "'[t]he trial judge is in the best position to assess the conduct of the plaintiff and the degree of noncompliance. . . .'" ___ So. 2d at ___ (quoting *Jones v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 604 So. 2d 332, 341 (Ala. 1991)). This rule is particularly apt in the resolution of the appeal now before us because the trial judge had the opportunity to observe Andra Capaci's demeanor while she disobeyed his orders. Yet, in concluding that Capaci's conduct was not sufficiently willful or contumacious to justify the dismissal of her claims with prejudice, the majority has disregarded this rule and substituted its judgment regarding the degree of Capaci's culpability for that of the trial judge.

Moreover, none of the less drastic sanctions suggested by the main opinion would have effectively redressed the prejudicial effect of Capaci's self-serving,

nonresponsive answers. Neither terminating her testimony, nor terminating her presentation of evidence altogether, nor striking the testimony she had already given, nor citing her for contempt would have eliminated the effect her improper testimony had already had on the jury. Moreover, declaring a mistrial after four days of trial would have punished Folmar Kenner, LLC, as much as it would have punished Capaci.

The record supports the trial judge's implicit finding that Capaci's misconduct was willful or contumacious; our caselaw authorizes the trial judge to dismiss a plaintiff's claims with prejudice when the plaintiff's disregard of the trial judge's orders is willful or contumacious, *see Jones v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 604 So. 2d at 341, and, contrary to the main opinion's suggestion, no lesser *effective* sanction was available. Therefore, I do not find the trial judge's dismissal of Capaci's claims with prejudice to be an abuse of his discretion. Consequently, I must respectfully dissent from the main opinion.

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

FOLMAR KENNER LLC Plaintiff v. CAPACI ANDRA DBA ANDRA CAPACI REAL ESTATE Defendant	)	**Case No.:** CV-2004002311.00

ORDER

(Filed Mar. 21, 2007)

This case is hereby DISMISSED. Judgment for the Defendant. Costs taxed against the Plaintiff.

DONE this 21st day of March, 2007

/s JOHN R LOCKETT
CIRCUIT JUDGE

EXHIBIT A

STATE OF ALABAMA

IN THE CIRCUIT COURT
FOR THE COUNTY OF MOBILE

THIRTEENTH JUDICIAL CIRCUIT

FOLMAR KENNER, LLC,

V CV-2004-2311

ANDRA CAPACI, ETC.

REPORTER'S OFFICIAL TRANSCRIPT
CROSS EXAMINATION OF ANDRA CAPACI

BEFORE: Honorable John R. Lockett and Jury
Mobile, Alabama – February 29, 2007

APPEARANCES:

For the Plaintiff:

Steven Thornton, Esq.
Kenneth J. Riemer, Esq.
Attorneys at Law

For the Defendant:

George M. Walker, Esq.
Attorney at Law

CAROL MORRISON
OFFICIAL COURT REPORTER

* * *

[R-82] Q That was the large sectional sofa?

A Yes.

Q Okay.

A No, it was not sectional. It was put together all like in one curved piece.

Q Well, you have large sectional sofa $4,000.00. You have custom sectional backless sofa for $5,000.00. You represented that one or the other of the sofas cost $4,000.00 or $5,000.00, right?

A One sofa cost about 4,000. That was the comfortable big one with the two chairs that went back.

Q In this return to the IRS you represented the office sofa cost $1304.00 and that you got it on December 7th, 2001, correct?

A Well, can I ask you – These are from 1999, 1999 figures here, 7/1999.

Q I am not arguing with you about it. I just want you to confirm that that's the representation that you made to the IRS.

A I don't understand it; I will be honest.

Q You don't have to understand it. I just want you to agree with me that that is the figure that's on your return to the IRS?

A I don't know.

Q You don't know. You can't see it there?

[R-83] A. I cross my heart and hope to die, I don't know. It says, 2004. I don't know where this

came from. I don't know where Shep got this. I didn't give it to him.

Q No, ma'am. I hadn't ask you any of that. I just want to know –

THE COURT: Okay. That's fine, Mr. Walker. Ladies and gentlemen, I am going to – I think we have gone long enough today, ladies and gentlemen. On behalf of the State of Alabama and the County of Mobile I certainly do appreciate your service during this course of this week. Mr. Berson here will have a check for the services for the time that you have rendered during the course of this case. I do appreciate your duty.

I know that jury service is not a – It is an inconvenience to most. It is a hardship to many. I do appreciate the time that you have taken during the course of the trial, during the course of this week.

Mr. Berson will go ahead and give you your checks and you can exit out the jury deliberation room. Again, thank you all very much for your service.

[R-84] (Jury not present.)

THE COURT: I think I gave Ms. Capaci every leeway I could possibly give, perhaps maybe too much. She continually disregarded my instructions to respond to the questions. I hereby dismiss the case with prejudice, cost attached to the plaintiff on this matter.

MR. WALKER: Thank you, Your Honor.

MR. THORNTON: Judge, we just reserve our objections.

THE COURT: You have got them all. Ms. Morrison will be available here to make whatever objections you would like to put on the record.

MR. WALKER: You said cost to the plaintiff, you meant against this plaintiff?

THE COURT: Yes.

MR. RIEMER: We would object to your decision.

THE COURT: I understand.

MR. THORNTON: I guess we except to your decision for a mistrial.

MR. WALKER: I don't think he declared a mistrial.

THE COURT: I dismissed the case with prejudice. You have 4 days to file your notice of appeal.

* * *

IN THE SUPREME COURT OF ALABAMA

[SEAL]

January 22, 2010

1070824 Ex parte Folmar Kenner, LLC. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Andra Capaci d/b/a Andra Capaci Real Estate v. Folmar Kenner, LLC) (Mobile Circuit Court: CV-04-2311; Civil Appeals : 2060846).

CERTIFICATE OF JUDGMENT

WHEREAS, the ruling on the application for rehearing filed in this case and indicated below was entered in this cause on January 22, 2010:

Application Overruled. No Opinion.
PER CURIAM – Cobb, C.J., and Lyons, Woodall, Stuart, Smith, Bolin, Parker, Murdock, and Shaw, JJ., concur.

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on September 18, 2009:

Reversed And Remanded. PER CURIAM – Cobb, C.J., and Lyons, Woodall, Stuart, Smith, Bolin, Parker, Murdock, and Shaw, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this

Court's judgment in this cause is certified on this date, IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 22nd day of January, 2010.

/s/ [Illegible]
Clerk, Supreme Court
of Alabama

Subj: **Yesterday in Court (Monday)**
Date: 2/27/2007 12:25:34 PM Central Standard Time
From: Rllipsey87@aol.com
To: andra@andracapaci.com, steve@lawlives.com

I have never seen such a jerk for a defense attorney as was George Walker who intentionally mislead the jury with his opening remarks: no building is water proof ; Andra mismanaged the air conditioning; she is only after money "Lots of money"! ; she committed fraud by valuing her belongings at $400,000-700,000 and then admitted it was actually under $20,000 ; and after remediation, "her own expert found no detectable mold anywhere" which is a lie since Driskill's lab results showed mold in the air on 5/27/07 in the five air samples.

The judge, Lockett, was not fair to Mr. Thornton or to me and did not seem to care that he made so many errors that could allow the case to be appealed. He would not let a single exhibit to be marked for the jury to see during my direct exam, but allowed Walker to mark a stack of irrelevant trash, to be marked for the jury to read during deliberation. Lockett would not allow me to finish most of my answers and threatened me to stop talking after saying yes to everything Walker read to the jury and concluded with, "Do you agree with that"? Lockett would not allow Mr. Thornton to ask any questions from the documents that Walker got to mark as exhibits not even as hypothetical's!

I felt that the judge tied my hands behind by back and allowed Walker to kick me on the stand, by

not allowing me to testify about key issues or finish my answers or let Mr. Thornton do his job without Walker dominating the proceedings.

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Supreme Court, U.S.
FILED
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No. 09-1291

In The
Supreme Court of the United States

ANDRA CAPACI,

Petitioner,

v.

FOLMAR KENNER, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Question 1

Whether the dismissal of the Petitioner's claims constituted a violation of the Petitioner's due process rights under the Fourteenth Amendment.

Question 2

Whether the trial court abused its discretion by permitting certain comments made by the Respondent's attorney or by not allowing the Petitioner to present certain evidence.

Question 3

Whether the Petitioner's constitutional rights were violated by the trial judge's exercise of discretion in dismissing the Petitioner's claims.

Question 4

Whether the Petitioner's due process rights were violated as a result of the trial judge's failure to recuse himself.

CORPORATE DISCLOSURE

In accordance with Supreme Court Rule 29.6, Respondent discloses the following:

Folmar Kenner, LLC has no parent company and no publicly held company holds a 10% or more ownership interest in Folmar.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
I. The Supreme Court of Alabama's Opinion For Which The Petitioner Seeks Review Did Not Decide A Question Of Federal Law	2
II. The petition fails to specify when the federal questions sought to be reviewed were raised in the state court proceedings	3
CONCLUSION	4

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83 (1997) 3, 4

Illinois v. Rodriguez, 497 U.S. 177 (1990) 2

Webb v. Webb, 451 U.S. 493 (1981) 3

STATUTES

28 U.S.C. § 1257 2

RULES

Supreme Court Rule 14 ..... 3, 4

STATEMENT OF THE CASE

This action was initiated by Respondent Folmar Kenner, LLC, ("Folmar") against Petitioner Andra Capaci, doing business as Andra Capaci Real Estate ("Capaci"), for breach of a lease agreement. (Pet. App. 2). Capaci counterclaimed, bringing several claims against Folmar. (Pet. App. 2-3). Folmar settled its claims against Capaci before a trial was had on those claims. (Pet. App. 3-4). Capaci testified on the fourth day of her jury trial and repeatedly volunteered information beyond that sought by the questions. (Pet. App. 4). The trial court repeatedly warned Capaci that it would terminate her testimony if she continued to volunteer information. (Pet. App. 4). After Capaci continued to ignore the trial court's warnings, the court dismissed the jury, ended the trial, and dismissed Capaci's counterclaims with prejudice. (Pet. App. 5).

An order dismissing the counterclaims and entering judgment for Folmar was entered on March 21, 2007. (Pet. App. 30). Capaci's post judgment motion arguing that the trial court erred in dismissing her claims was denied, and on May 2, 2007, Capaci filed a timely notice of appeal. (Pet. App. 22). The Alabama Court of Civil Appeals reversed the trial court's dismissal of Capaci's claims finding that her trial misconduct did not "mandate dismissal." (Pet. App. 27). The Supreme Court of Alabama reversed the judgment of the Court of Civil Appeals, holding that the trial court did not exceed its discretion in dismissing Capaci's counterclaims under Rule 41(b) of the

Alabama Rules of Civil Procedure. (Pet. App 17-18). The Petition prays that this Court will issue a Writ of Certiorari to review the Supreme Court of Alabama's judgment in this case. (Pet. 6).

REASONS FOR DENYING THE WRIT

I. The Supreme Court of Alabama's Opinion For Which The Petitioner Seeks Review Did Not Decide A Question Of Federal Law.

The Petition to review the Supreme Court of Alabama's judgment in this case presents no issues concerning important federal questions. "When a state-court decision is clearly based on state law that is both adequate and independent, [this Court] will not review the decision." *Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990) (citations omitted); *see also* 28 U.S.C. § 1257. The Petition asserts that federal questions are at issue because the trial judge's alleged abuse of discretion is claimed to have violated the Petitioner's constitutional rights. However, the opinion of the Supreme Court of Alabama specifically held that the trial court did not exceed its discretion in dismissing the Petitioner's counterclaims with prejudice under Rule 41(b) of the Alabama Rules of Civil Procedure. (Pet. App. 17). This Court has consistently "adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court

that rendered the decision [it has] been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (citations omitted). In the present case, the Petitioner seeks review of an Alabama judgment that did not address a federal question. The Petition should be denied for this reason alone.

II. The petition fails to specify when the federal questions sought to be reviewed were raised in the state court proceedings.

This Petition omits any statement or reference to the record showing that Petitioner sought review of the federal questions presented here during the state court proceedings. Supreme Court Rule 14 requires a petition to specify "the stage in the proceedings, both in the court of first instances and in the appellate courts, when the federal questions sought to be reviewed were raised." SUP. CT. R. 14.1(g)(i).

Dismissal of a petition is proper where a petitioner fails to meet its "burden of showing that the claim" before the Supreme Court was presented to the state court. *Adams*, 520 U.S. at 90; *see also* SUP. CT. R. 14.4. In *Adams*, this Court noted the importance of this rule in that "disturb[ing] the finality of state judgments on a federal ground that the state court did not have occasion to consider" is at odds with the principles of comity. *See Adams*, 520 U.S. at 90 (citing *Webb v. Webb*, 451 U.S. 493, 500 (1981)). The *Adams* Court also held the petitioners' reference to "papers filed in the trial court" were insufficient "to

comply with our requirement that petitioners provide us with '*specific* references to the places in the record where the matter appears.'" *Id.* at 89 n.3 (citing SUP. CT. R. 14(g)(i)) (emphasis in original).

Likewise, in the present case, the Petitioner has failed to meet her burden of showing that the federal issues of which she seeks review, were properly presented in the state court proceedings. Thus, the Petition fails to comply with the requirements of Supreme Court Rule 14 and should be denied.

CONCLUSION

For all of these reasons, the Petition should be denied.

Respectfully submitted,

GEORGE M. WALKER
Attorney for Respondent

Supreme Court, U.S.
FILED
JAN 7 - 2010
OFFICE OF THE CLERK

No. 09-1291

In The

Supreme Court of the United States

ANDRA CAPACI,

Petitioner,

v.

FOLMAR KENNER, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

REPLY BRIEF

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TABLE OF CONTENTS

Page

THE TRIAL JUDGE'S ABUSE OF DISCRETION 1

THE RESPONDENT'S ATTORNEY'S FALSE STATEMENTS ABUSED THE INTEGRITY OF THE TRIAL PROCESS 3

THE SUPREME COURT OF ALABAMA'S RULING WAS ERRONEOUS 5

WRIT OF CERTIORARI IS TO BE GRANTED UPON REVIEW OF SUPREME COURT OF ALABAMA'S JUDGMENT 7

FEDERAL DUE PROCESS ISSUES WERE PROPERLY PRESENTED IN THE STATE COURT PROCEEDINGS, IN ALL BRIEFS, AND IN THE MOTION FOR NEW TRIAL AT THE TRIAL COURT LEVEL 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Hodge v. R & R Movers, 716 So.2d 740 (Ala.Civ.App.1998) 2

Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841 (1897) 6

Lampf, Pleva v. Gilbertson, 501 U.S. 350 (1991) 8

McCollum v. Birmingham Post Co., 259 Ala. 88, 65 So.2d 689 (1953) 6

Plaut v. Spendthrift Farms, 514 U.S. 211 (1995) 7

CONSTITUTIONAL PROVISION

Fourteenth Amendment 1, 6

RULES

F.R.Civ.P. 41(b) 2, 5

Sup.Ct.R. 15 ..... *passim*

OTHER AUTHORITIES

Annot., 14 A.L.R. 2d 589 6

TRIAL JUDGE'S ABUSE OF DISCRETION

The dismissal of the Petitioner's claims did constitute a violation of the Petitioner's due process rights under the Fourteenth Amendment, because:

1. The trial judge made an unconstitutional ruling that violated the rights of a Louisiana citizen in the Courts of Alabama.

2. The Alabama rules must comply with the Federal Constitutional Rights of due process under the Fourteenth Amendment.

3. The Trial Judge did not preserve Petitioner's JURY TRIAL RIGHT by dismissing her case before the jury could hear the actual merits.

4. The Trial Judge required Petitioner to answer questions EXACTLY the way he wanted which was not supported by Alabama rule.

5. The Court's DISMISSAL OF THE CASE WITH PREJUDICE came **without warning** that such a consequence might follow from Ms. Capaci's "non responsive" answers. His warnings were **constitutionally insufficient** and violated her constitutional due process rights, because:

a. The Court warned her that he would **"terminate her testimony"** (R.506).

b. The Court warned her that **"the trial will end the next time you volunteer an answer that is not requested by the question"**

c. The Court did not warn her or her counsel that he would **sua sponte dismiss the action with prejudice.**

Hodge v. R & R Movers, 716 So.2d 740 (Ala.Civ.App.1998) (dismissal of action for a failure to file certificate of readiness where plaintiff received no notice of requirement for filing certificate and no notice of setting for dismissal).

Lack of notice is a relevant factor in assessing the propriety of the court's discretion in dismissing the case.

Since the trial court in sua sponte dismissed with prejudice, he violated the DUE PROCESS rights of Capaci to a hearing on the merits of her claims with a jury, and was an abuse of discretion of the trial court's power under Rule 41(b).

THE RESPONDENT'S ATTORNEY'S FALSE STATEMENTS ABUSED THE INTEGRITY OF THE TRIAL PROCESS

Initially, the Respondent's attorney filed a lawsuit on Capaci, **KNOWINGLY BASED ON A LIE**, that she caused the mold in her leased space by misuse of the air-conditioner. The Respondent and his attorney had proof from their experts and Capaci's experts that the mold was due to a leaky roof and deferred maintenance, but yet, she was sued, in spite of their knowledge to the contrary.

When the Petitioner's attorney was questioning the Respondent on his cross-examination, he asked why he sued Capaci (a 9 year tenant) in the first place. The Respondent's attorney jumped up and stopped Capaci's lawyer who knew she was sued based on a lie. The Respondent admitted knowing the mold was due to a leaky roof before Petitioner was unjustly sued.

> The Respondent's attorney said, "My client had nothing to do with it. I wrote the complaint. What are you going to do? Sue me for malicious prosecution?"

The judge then stopped Capaci's attorney from further questioning, on that subject.

Besides misleading the jury, and trying to prejudice the jury against Capaci by telling them before the cross-exam began, that, "I am going to prove today, that Capaci committed FRAUD against the I.R.S." the Respondent's attorney exaggerated the

number of times Capaci did not answer "yes" or "no" in his brief to the Supreme Court of Alabama.

The Respondent's attorney also misled the Supreme Court of Alabama in his brief, which no doubt, caused the conflict between the Alabama Appellate Court and the Supreme Court of Alabama. Some of his false statements were:

1. Capaci was not credible.
2. Capaci committed fraud with the I.R.S.
3. Capaci was guilty of Contempt of Court.
4. Capaci's conduct was contumacious and willful.

Yet, there was not one bit of evidence to support the Respondent's attorney's claims. The trial judge said nothing about Capaci's conduct, ONLY THAT HE DID NOT LIKE THE WAY SHE ANSWERED QUESTIONS. Capaci tried her hardest to answer the way the judge insisted, but would get nervous and forget. However, nervousness should not mandate a dismissal with prejudice.

THE SUPREME COURT OF ALABAMA'S RULING WAS ERRONEOUS BECAUSE:

1. The Supreme Court of Alabama could not have scrutinized the record.

2. Had the Supreme Court scrutinized the record they would have found:

    a. Capaci expressed her nervousness numerous times, as she struggled to answer correctly and cautiously, but could not focus, no matter how hard she tried. It was not done on purpose; the more the judge warned her, the more nervous she got.

    b. Capaci was polite, never got angry, and was apologetic to both the judge and the attorney.

    c. Capaci was deprived of her "jury rights" and her "day in court." In Rule 41(b) F.R.C.P. a trial judge is not allowed to dismiss when there is a jury trial . . . only a non-jury.

    d. Capaci was **not cited for contempt of court**. The judge simply did not like **the way** she **responded** to the questions; but she did respond to everyone without delay or willfulness, and to the best of her ability in her nervous state.

The Supreme Court of Alabama ruled on the theory that Capaci had been cited for "contempt of

court." Although this was not true, there are constitutional limitations upon the Court's inherent power to dismiss an action for disobedience of a court order. In McCollum v. Birmingham Post Co., 259 Ala. 88, 65 So.2d 689 (1953), the Alabama Supreme Court recognized the constitutional limitations upon the Court's inherent power to dismiss an action for disobedience of a court order. The Court held that the dismissal of a libel suit, due to the plaintiff's failure to submit to a perpetuation of his testimony in collateral proceedings, was void as a denial of **due process of law** under the Alabama and U.S. Constitutions, where there had been no default by the plaintiff in the prosecution of his action. 65 So.2d at 695. Relying upon Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841 (1897), as the "leading case," the Court observed,

> Courts have no inherent power to punish contempt by denying a hearing to the contemnor, in striking his pleadings, or entering default judgement or dismissal against him, since one of the fundamental conceptions governing the court of justice is condemnation only after a hearing, and an order of this nature denying the condemnor a right, as distinguished from a favor, is void for want of due process of law in violation of the Fourteenth Amendment to the Federal Constitution or a comparable provision of the applicable state Constitution."

65 So.2d at 694 (quoting Annot., 14 A.L.R. 2d 589, 5).

The Supreme Court of Alabama relied solely on the Respondent's lawyer's false and baseless allegations, and his initial FRIVOLOUS LAWSUIT vs Andra Capaci which led to this counter-suit. All of this could have been avoided, had the Respondent's lawyer advised his client to try to remedy the mold situation, and the expensive damage it caused by offering Andra Capaci, a 9 year tenant, a solution or help, for her loss of $500,000 to $700,000 due to the mold in Respondent's property. Instead, Capaci got sued based on a LIE!!!

I. WRIT OF CERTIORARI IS TO BE GRANTED UPON REVIEW OF SUPREME COURT OF ALABAMA'S JUDGEMENT BECAUSE:

1. To say simply that there are adequate and independent state grounds to defeat federal high court review does **not** make it true.

2. The adequate and independent state ground doctrine provides **certain exceptions** to this general rule. Litigants can raise federal claims in state court, and this general rule breaks down. See following cases:

    a. Plaut v. Spendthrift Farms, 514 U.S. 211 (1995) DUE PROCESS; Judgement; Finality.

    b. Constitutionality of statute requiring federal courts to reopen final judgements in cases **dismissed with**

prejudice pursuant to Supreme Court's decision in Lampf, Pleva v. Gilbertson, 501 U.S. 350 (1991).

II. FEDERAL DUE PROCESS ISSUES WERE PROPERLY PRESENTED IN THE STATE COURT PROCEEDINGS, IN ALL BRIEFS, AND IN THE MOTION FOR NEW TRIAL AT THE TRIAL COURT LEVEL

1. April 17, 2007 in Circuit Court of Mobile County, Alabama Civil Action . . . CV-04-2311.00 Motion for new trial and/or motion to alter, amend or vacate judgement. It was argued that the dismissal denied Capaci due process of law (C.1511). This motion was denied on April 25, 2007 (C.1617). A timely notice of appeal was filed on May 2, 2007 (C.1618).

2. October 11, 2007 in Alabama Court of Civil Appeals . . . Case 2060846 Summary Argument (see page 12).

3. October 2, 2009 in brief to Supreme Court of Alabama . . . Case 1070824 in the Application for rehearing and brief in support of (see page 11).

CONCLUSION

To the Supreme Court of America's Most Honorable Judges, their Assistants, and Anyone involved who works for Truth to Prevail and Justice to Abound, I respect and honor the work that you do, and I want to thank you in advance for considering this case for review so that other litigants who follow me will be able to enjoy their due process rights under the Constitution of the United States.

Respectfully submitted,

ANDRA CAPACI

No. 09-1291

Supreme Court, U.S.
FILED
JUL 16 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ANDRA CAPACI,

Petitioner,

v.

FOLMAR KENNER, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR REHEARING

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PETITION FOR REHEARING

I, petitioner, Andra Capaci, Pro se, respectfully move this court to:

1. Vacate it's order of June 21st, 2010, which denied my petition for a Writ of Certiorari filed by myself.
2. Grant the petition for Writ of Certiorari.

The grounds for rehearing are stated below:

1. The State of Alabama rules must comply with the Federal Constitutional rights of Due Process under the 14th Amendment.
2. The State of Alabama is depriving me, a Louisiana Citizen, of what is mine under this law by denying me my day in court.
3. It is a critical point to say that had my case been presented to the jury and not dismissed with prejudice prior to the jury actually hearing the merits of the case, the results would have been different.
4. The trial judge and the appellate court were at odds confirming the need for this court to grant Certiorari.

I beg for the provisions of the 14th Amendment to be enforced.

SUMMARY OF CASE

For 7 years I have been involved in this lawsuit.

I was a tenant in a shopping center for 9 years and my space developed serious health threatening mold. Instead of helping me, my landlord listened to their attorney who maliciously sued me for causing the mold. I counter sued as I had much to lose (about $500,000-$700,000). Their experts and my experts said the mold was caused by lack of maintenance.

My liability insurance carrier paid them $37,500 to settle which they did. However, I had lost all 7 offices full of furniture, conference room, reception area, etc . . . , a tremendous loss to me, including all of my intellectual material, customer files, and personal belongings. I was also under the care of a mold physician. All of my property was carelessly thrown into a trailer, now contaminated by the mold, which was later sold by Folmar.

I walked away losing all and now Folmar's insurance company wants $25,503.78 from me which is more than a hardship at this time. They want this money by October 7th, 2010.

For the 5 years since Hurricane Katrina, I have been a care taker for my parents, 96 years old and 94 years old. Their home flooded and they lost everything and moved in with me. On the day my Writ of Certiorari was denied, my father died. He was a Captain with the State Police for 34 years. My mother, 96 years old is still living with me. My parents were

married 74 years. My father taught me to "Never Quit." I know he would have wanted me to go on and petition for a re-hearing.

I know I need a miracle with this case, because it sure has been a tough 7 years. I have had a lot of legal expenses. Folmar literally really took its toll on me and they should be punished. I pray that whomever reads this can see it for what it really is.

The court should grant re-hearing in light of the 14th Amendment and its guarantee to protect me with fair trial procedures, due process, and equal protection of the law.

Respectively submitted,

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CERTIFICATION

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2.

ANDRA CAPACI

TABLE OF CONTENTS

Page

Appendix

Alabama Supreme Court Brief ..... App. 1

Alabama Court of Civil Appeals Brief ..... App. 18

App. 1

IN THE SUPREME COURT OF ALABAMA
1070824

Ex parte Folmar Kenner, LLC

(In re Andra Capaci d/b/a Andra Capaci Real Estate
v.
Folmar Kenner, LLC)

Appeal from Mobile Circuit Court
CV-04-2311

RESPONDENT CAPACI'S APPLICATION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

APPLICATION OF REHEARING 1

BRIEF IN SUPPORT OF APPLICATION OF REHEARING 5

STATEMENT OF ISSUES 5

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. THE APPROPRIATENESS OF AN INVOLUNTARY DISMISSAL WITH PREJUDICE, AS A SANCTION FOR DISOBEDIENCE OF A COURT ORDER, DEPENDS UPON MORE THAN A FINDING OF WILLFUL OR CONTUMACIOUS CONDUCT 6

II. THE TRIAL COURT'S INVOLUNTARY DISMISSAL IN THIS ACTION WAS AN ABUSE OF DISCRETION WHEN ALL APPROPRIATE FACTORS ARE CONSIDERED 11

CONCLUSION 13

CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

State Cases

Atkins v. Shirley, 561 So.2d 1075, 1077 (Ala. 1990) 7

Burdeshaw v. White, 585 So.2d 842, 847-48 ..... 7, 9, 10

Iverson v. Xpert Tune, Inc., 533 So.2d 82, 87 (Ala. 1989) 7

Marcoal, Inc. v. United Mine Workers of America, 292 Ala. 567, 569, 298 So.2d 6, 8 (1974) 7

Selby v. Money, 403 So.2d 218, 220-21 (Ala. 1981) 6, 10

Smith v. Wilcox County Board of Education, 365 So.2d 659 (Ala. 1978) 7

Vesta Fire Insurance Corp. v. Milam Co. Construction, Inc., 901 So.2d 84, 95 (Ala. 2004) 7

Federal Cases

Degen v. U.S., 517 U.S. 820, 828, 116 S.Ct. 1777 (1996) 9

Ex parte Andrews, 2009 WL 1426031 (Ala.S.Ct. May 22, 2009) 8

Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1338 (9th Cir. 1985) 9

Hammond Packing Co. v. Arkansas, 212 U.S. 322, 29 S.Ct. 370 (1909) 8, 9

Hodge v. R&R Movers, 716 So.2d 740 (Ala. Civ. App. 1998) 8

Hosey v. Lowery, 911 So.2d 15, 18 (Ala. Civ. App. 2005) 6, 7, 8

Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841 (1897) 9

Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 705-06, 102 S.Ct. 2099 (1982) 8, 9

Societe Internationale v. Rogers, 357 U.S. 197, 209, 78 S.Ct. 1087 (1958) 8

Wyle v. R.G. Reynolds Industries, Inc., 709 F.2d 585, 589 (9th Cir. 1983) 9

Statutes and Rules of Court

Rule 41(b), A.R.C.P. 2, 5, 6

OTHER

A.Wright & Miller, *Federal Practice and Procedure Civ. 2d* § 2283 9

APPLICATION FOR REHEARING

COMES now the Respondent Andra Capaci, d/b/a Andra Capaci Real Estate, and, pursuant to Rule 40, *ARAP*, files this application for a rehearing on the Court's opinion in this cause issued on September 18, 2009. As and for grounds for said rehearing, Respondent would show this Honorable Court as follows:

1. This Court has concluded that the Court of Civil Appeals substituted its own judgment for that of

the trial court, in concluding that Ms. Capaci's conduct was not willful or contumacious, in contravention of "the well-established principle that the trial court is far better situated than is an appellate court to determine whether Capaci's conduct was willful or contumacious because the trial court has the advantage of personally observing the witness' testimony and is not confined to a removed reading of a cold record." (Slip Op. at 15). On this basis, the Court has reversed the Court of Civil Appeals and reinstated the trial court's judgment of dismissal.

2. Respondent respectfully submits that this Court has misapprehended the decision of the Court of Civil Appeals. That Court, first of all, did *not* conclude that Ms. Capaci's conduct was not willful or contumacious. The Court of Civil Appeals agreed with the trial court that Ms. Capaci's failure to heed the trial court's warnings "warranted some form of sanction." (Ct. Civ. App. slip op. at p. 11). Such sanctions could not have been imposed in the absence of some evidence of willful or contumacious conduct. Rather, the Court of Appeals engaged in the kind of "careful scrutiny" that this Court has demanded in the review of orders of involuntary dismissal and determined that her conduct "did not rise to the level that would warrant the extreme sanction of a dismissal with prejudice of her claims; in other words, her conduct did not 'mandate dismissal.'" (*Id.*). The Court of Civil Appeals discussed the failure of the trial court to impose "other less drastic alternatives" to that of dismissal (*Id.*), and also made note of the

fact that the trial court had not given prior notice to Capaci that it was considering dismissal of her claims. (*Id.* at p. 9). These are precisely the factors that a reviewing court must consider, among others, in determining whether the "extreme circumstances" exist so as to justify the "harsh sanction" of involuntary dismissal.

3. Respondent respectfully submits that this Court has, by its decision, insulated Rule 41(b) orders of involuntary dismissal from any meaningful scrutiny on appellate review. The Court has essentially held that if any evidence exists to support an implied finding of contempt, that is sufficient to warrant affirmance of an involuntary dismissal as a sanction for that contempt. Respondent respectfully submits this is not the law. There is a vast difference between appellate review of a finding of contempt in proceedings not involving the dismissal of a claim, and review of an order of involuntary dismissal imposed as a sanction for such contempt. In the former, there has been no denial of the right to be heard on the merits of a claim; in the latter, that fundamental right has been denied by the involuntary dismissal of the claims as a sanction. In the former, review can most certainly be deferential; in the latter, careful scrutiny of the totality of the circumstance is required.

4. Respondent respectfully submits that if this Court is of the opinion that the Court of Civil Appeals improperly substituted its judgment for that of the trial court, in concluding that Ms. Capaci's conduct

was not contemptuous, it can and should reverse the decision on that basis and remand it to the Court of Civil Appeals for further consideration of all of the factors relevant to weighing the appropriateness of the dismissal sanction. Alternatively, this Court should engage in that analysis itself before affirming the trial court's decision.

5. Respondent respectfully submits the attached brief in support of her Application for Rehearing.

Respectfully Submitted,

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BRIEF IN SUPPORT OF APPLICATION OF REHEARING

STATEMENT OF ISSUES

1. Whether, in reviewing involuntary dismissal of an action under Rule 41(b), the appellate court must not simply defer to an implied finding by the trial court of willful or contumacious conduct but must carefully scrutinize the record to determine whether that conduct was so egregious that no lesser sanction would have availed.

2. Whether the Court of Civil Appeals engaged in a proper scrutiny of the record, applying the

appropriate factors in concluding that involuntary dismissal of this action was not justified.

SUMMARY OF ARGUMENT

This Court's opinion reverses the Court of Civil Appeals and upholds the judgment of the trial court on the basis of its conclusion that the Court of Civil Appeals substituted its judgment for that of the trial court with respect to an implied finding of willful or contumacious conduct on the part of Ms. Capaci. Respondent respectfully submits that the Court of Civil Appeals did *not* substitute its judgment for that of the trial court but rather agreed with the trial court that Ms. Capaci's conduct was sufficiently willful to justify some sanction. The Court of Civil Appeals simply concluded that the totality of the circumstances did not justify involuntary dismissal under Rule 41(b). A finding of willful or contumacious conduct on the part of Ms. Capaci does not, in and of itself, justify the involuntary dismissal of her action. The trial court, and any reviewing court, must concern itself with the extremity of that conduct, whether notice was given that dismissal might result from that conduct, whether lesser sanctions were available, and the degree to which that conduct may have interfered with the functions of the judicial process in arriving at the truth and administering justice. When those factors are considered in this case, the decision of the Court of Civil Appeals was entirely appropriate in reversing the trial court's decision dismissing the action against Ms. Capaci.

The extremely harsh sanction of involuntary dismissal must be "proportionate to the offense." *Hosey v. Lowery*, 911 So.2d 15, 18 (Ala. Civ. App. 2005). Under that principle, dismissal of Ms. Capaci's action was not warranted.

ARGUMENT

I. THE APPROPRIATENESS OF AN INVOLUNTARY DISMISSAL WITH PREJUDICE, AS A SANCTION FOR DISOBEDIENCE OF A COURT ORDER, DEPENDS UPON MORE THAN A FINDING OF WILLFUL OR CONTUMACIOUS CONDUCT

As this Court has recognized, involuntary dismissal with prejudice under Rule 41(b) "is a harsh sanction and should be used only in extreme circumstances." *Selby v. Money*, 403 So.2d 218, 220-21 (Ala. 1981). Dismissal orders must be "carefully scrutinized" and the plaintiff's conduct must "mandate dismissal". *Vesta Fire Insurance Corp. v. Milam Co. Construction, Inc.*, 901 So.2d 84, 95 (Ala. 2004) (quoting *Iverson v. Xpert Tune, Inc.*, 553 So.2d 82, 87 (Ala. 1989)).

The propriety of an involuntary dismissal depends upon more than some evidence of willful or contumacious conduct. First of all, this Court has demanded a "clear record" of delay or contumacious conduct by the plaintiff; and a "serious showing" of willful default. *Burdeshaw v. White*, 585 So.2d 842,

848 (Ala. 1991) (quoting *Smith v. Wilcox County Board of Education*, 365 So.2d 659 (Ala. 1978)).

Secondly, this Court has held that involuntary dismissal of a plaintiff's case as a sanction is a measure of last resort. "'Where lesser sanctions are available they should be tried.'" *Atkins v. Shirley*, 561 So.2d 1075, 1077 (Ala. 1990) (quoting *Marcoal, Inc. v. United Mine Workers of America*, 292 Ala. 567, 569, 298 So.2d 6, 8 (1974)).

Another relevant factor, based on due process considerations, is whether notice had been given that dismissal of an action might occur as a result of the conduct at issue. *See Hosey v. Lowery*, 911 So.2d 15, 18 (Ala. Civ. App. 2005) (dismissal of plaintiff's claims, as sanction for failure of plaintiff's counsel to attend hearing on motions that had been rendered moot, without prior notice that dismissal of claims would be considered at the hearing, violated Plaintiff's due process rights); *Hodge v. R&R Movers*, 716 So.2d 740 (Ala. Civ. App. 1998) (dismissal of action for failure to file certificate of readiness reversed where Plaintiff received no notice of requirement for filing certificate and no notice of setting for dismissal). *See also Ex parte Andrews*, 2009 WL 1426031 (Ala.S.Ct. May 22, 2009) (quoting *Hosey v. Lowery, supra*, approvingly) and other cases cited in Capaci's Opposition Brief at p. 49.

Finally, due process considerations require some causal nexus between a party's misconduct that triggered the dismissal and some interference with

the judicial process of ascertaining the truth and administering justice between the parties. Where the misconduct of a party interferes with the production of evidence so as to justify a presumption that a party's claim or defense lacks merit, default or dismissal, as a sanction for that misconduct, is consistent with due process concerns. *See Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 29 S.Ct. 370 (1909); *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 705-06, 102 S.Ct. 2099 (1982); *Societe Internationale v. Rogers*, 357 U.S. 197, 209, 78 S.Ct. 1087 (1958). On the other hand, where such a sanction is issued to punish a contempt of court that does not raise such a presumption or otherwise threaten truth-seeking functions, due process is violated. *See Hovey v. Elliott*, 167 U.S. 409, 17 S.Ct. 841 (1897); *Insurance Corp of Ireland, Ltd.*, 456 U.S. at 706 (due process violated "if the behavior of the defendant will not support the *Hammond Packing* presumption"); *Degen v. U.S.*, 517 U.S. 820, 828, 116 S.Ct. 1777 (1996) (citing *Hovey* approvingly for unconstitutionality of dismissal as punishment for contempt of court); *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334, 1338 (9th Cir. 1985) (due process prevents imposition of severe sanctions of dismissal or default "merely for punishment of an infraction that did not threaten to interfere with the rightful decision of the case") (quoting *Wyle v. R.G. Reynolds Industries, Inc.*, 709 F.2d 585, 589 (9th Cir. 1983)). *See generally* A. Wright & Miller, *Federal Practice and Procedure Civ. 2d* § 2283 (discussing constitutional limits on Rule 37

sanctions). These arguments are addressed in more detail in Capaci's opposition Brief at pp. 32-37.

In summary, appellate review of a judgment of involuntary dismissal, entered as a sanction for disobedience to a court order or for other misconduct, before or during trial, requires a careful consideration and weighing of a number of different factors. The Court must be convinced that a point has been reached where "the interest of the court in controlling its calendar and the risk to the defendant **outweigh** the interest in disposing of the litigation on the merits." *Burdeshaw v. White*, 585 So.2d at 847 (quoting *Selby v. Money*, 403 So.2d at 220-21) (emphasis added). Where, upon appellate review, that point had not been reached at the trial court level, a judgment of dismissal must be reversed. *See Burdeshaw v. White*, 585 So.2d at 849.

Respondent respectfully submits that this Court, in its opinion, has not engaged in the requisite weighing of the competing interests at stake and has not employed the requisite factors to be considered in determining the propriety of the dismissal. The Court has simply concluded that the Court of Civil Appeals substituted its judgment for that of the trial court in concluding that Ms. Capaci's conduct was not willful or contumacious. Respondent begs to differ that this was, in fact, the conclusion of the Court of Civil Appeals. Rather, that Court engaged in the kind of "careful scrutiny" of the trial court's actions, as historically mandated by this Court, by considering

the various factors discussed above, and weighing the competing interests.

This Court's reliance on decisions which have upheld findings of contempt, but which have not involved the severe sanction of dismissal of an action or the entry of default, suggests that the same standard of review should be employed in the present context. Again, Respondent submits that this is not the law. A finding of fact by the trial court, with respect to whether certain action has risen to a level sufficient to support a citation of contempt, is reviewed with a different degree of deference than a decision dismissing an action as a sanction for such contumacious conduct. This Court's conclusion that there was evidence to support the trial court's holding that Ms. Capaci acted "consciously, as opposed to accidentally or involuntarily," and thus "willfully", in failing to follow the trial court's repeated orders, (slip op. at p. 14), is not alone sufficient to justify the trial court's imposition of the severe sanction of dismissal. And yet the Court's opinion fails to consider anything else in its reversal of the Court of Civil Appeals' decision and the reinstatement of the judgment of dismissal. More is required to justify such an involuntary dismissal, both by the Constitution and this Court's own precedents.

II. THE TRIAL COURT'S INVOLUNTARY DISMISSAL IN THIS ACTION WAS AN ABUSE OF DISCRETION WHEN ALL APPROPRIATE FACTORS ARE CONSIDERED

Respondent, in her brief, set forth the factors that should be applied in assessing the propriety of an involuntary dismissal and demonstrated that, in this action, consideration of those factors should lead to the conclusion that the trial court abused its discretion and/or violated due process in dismissing this action.

First of all, as the Court of Civil Appeals recognized, Ms. Capaci's conduct, although it may have merited some form of sanction, was not egregious This is not a case involving a witness' defiance of the Court's authority, insults directed to the Court or to the other parties, or other conduct casting any aspersions upon the Court's authority. Nor does it involve conduct involving the withholding of evidence such that an inference could be drawn that Capaci's claims lacked merit. Ms. Capaci was simply a nervous witness who said too much on too many occasions after being admonished not to do so by the Court. Although the trial judge may have been in a better position than a reviewing court to assess the actual attitude of the witness, that does not eliminate the necessity for a reviewing court to review the record and, applying whatever deference is appropriate, independently assessing the egregiousness of the conduct from that record.

Secondly, as argued in Respondent's Opposition Brief, and as discussed in the opinion of the Court of Civil Appeals, there were lesser sanctions that were available and which were not tried by the Court. These included "ending Capaci's testimony, striking her testimony in its entirety, ending her presentation of evidence and submitting the matter immediately to the jury, or finding her in contempt." (Ct. Civ. App. slip op. at p. 11). *See also* Capaci's Opposition Brief at pp. [illegible]-59.

Thirdly, as the Court of Civil Appeals recognized, Ms. Capaci received no warning from the trial court that it would dismiss her action with prejudice as a result of her continuing failure to confine her testimony to the questions asked. He only warned her that he would "terminate" her testimony (R. 506) and that he would "end the trial." (R. 599).

In summary, the Court of Civil Appeals engaged in an appropriate and careful scrutiny of the totality of circumstances surrounding the involuntary dismissal of Ms. Capaci's action. It concluded, appropriately, that the trial court had abused its discretion under the circumstances.

CONCLUSION

For all of the above reasons, Respondent respectfully requests that this Court grant her application for rehearing and, upon reconsideration of its opinion, either affirm the decision of the Court of

Civil Appeals or remand the decision to that Court for further consideration in light of this Court's opinion.

Respectfully Submitted,

/s/ William W. Watts

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 2009, I electronically filed the foregoing with the Clerk of Court using the AlaFile system which will send notification of such filing to the following:

George M. Walker, Esq.
Hand, Arendall, LLC
P.O. Box 123
Mobile, AL 36602

and by by United States Mail, first-class postage prepaid to the following:

Honorable Robert G. Esdale, Sr.
Clerk of the Supreme Court
Supreme Court of Alabama
300 Dexter Avenue
Montgomery, AL 36104-3741

George M. Walker, Esq.
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P.O. Box 123
Mobile, AL 36602

s/s William W. Watts, III

IN THE ALABAMA COURT OF CIVIL APPEALS
CASE NO. 2060846

ANDRA CAPACI d/b/a
ANDRA CAPACI REAL ESTATE

Appellant

v.

FOLMAR KENNER, LLC

Appellee

On Appeal from the Circuit Court of
Mobile County, Alabama
Civil Action No. 04-2311

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BRIEF OF APPELLANT

STATEMENT OF THE CASE

This action was commenced by counterclaim defendant-appellee Folmar Kenner, LLC ("Folmar") against counterclaimant-appellant Andra Capaci d/b/a Andra Capaci Real Estate ("Capaci") for breach of a shopping center lease. (C.1) Capaci counterclaimed for breach of the covenant of quiet enjoyment and constructive eviction. (C.24). In particular, Capaci alleged breach of contract, negligence and willfulness in the failure of the landlord Folmar to properly construct and maintain the premises, resulting in the growth and proliferation of toxic mold, causing her bodily injury and property damage and forcing her to vacate the premises and to incur extra expenses and costs in doing so. (C.26-29).

The claims of Folmar against Capaci were ultimately settled before trial by Capaci's liability insurer. (C971). Trial on Capaci's counterclaims commenced on February 26, 2007. (C.1649). Near the close of the fourth day of trial, Ms. Capaci was testifying on the stand. After several warnings to keep her answers responsive to the questions, the court terminated her testimony, terminated the trial, and sua sponte dismissed Capaci's counterclaims with prejudice. (R.644; C.1507).

An order dismissing the counterclaims and entering judgment for Folmar was entered on March 21, 2007. (C.1507). Costs were taxed against Capaci. (*Id.*) A motion for new trial or to alter or amend the judgment was filed on April 17, 2007 (C.1511), and

was denied on April 25, 2007. (C.1617). A timely notice of appeal was thereafter filed on May 2, 2007. (C.1618).

STATEMENT OF THE ISSUES

1. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING SUA SPONTE THE APPELLANT'S ACTION WITH PREJUDICE DUE TO APPELLANT'S FAILURE TO CONFINE HER TESTIMONY TO THE QUESTIONS ASKED OF HER, WHERE APPELLANT WAS NOT GUILTY OF ANY WILLFULNESS OR CONTUMACIOUS CONDUCT IN DOING SO.

2. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING SUA SPONTE APPELLANT'S ACTION WITH PREJUDICE, WITHOUT WARNING THAT IT WOULD DO SO, AND WHERE LESSER SANCTIONS WERE AVAILABLE TO DO JUSTICE BETWEEN THE PARTIES.

3. IF THE JUDGMENT BELOW IS AFFIRMED, WHETHER AN AWARD OF COSTS PURSUANT TO RULE 68, *A.R.C.P.* WAS PROPER WHERE APPELLANT CAPACI RECOVERED NO JUDGMENT AGAINST APPELLEE FOLMAR.

4. IF THE JUDGMENT BELOW IS AFFIRMED, WHETHER THE AWARD OF COSTS MUST BE REVERSED AND THE CASE REMANDED FOR FURTHER PROCEEDINGS BECAUSE IT CANNOT BE DETERMINED WHETHER THAT AWARD WAS

PROPERLY BASED UPON THE COURT'S DISCRETIONARY AUTHORITY UNDER RULE 54(d) OR IMPROPERLY BASED UPON THE MANDATORY PROVISIONS OF RULE 68, *A.R.C.P.*

5. IF THE JUDGMENT BELOW IS AFFIRMED, WHETHER THE AWARD OF CERTAIN EXPENSES AS COSTS WERE BEYOND THE POWER OF THE TRIAL COURT UNDER RULE 54(d) OR RULE 68.

STATEMENT OF THE FACTS

Andra Capaci d/b/a Andra Capaci Real Estate ("Capaci") leased office space from defendant Folmar Kenner, LLP ("Folmar") in a shopping center in Kenner, Louisiana. Capaci experienced problems with water intrusion into the premises over the years. In May of 2004, Capaci observed mold growth in her office space and wrote a letter to Folmar complaining about it. Two days later, when a bathroom ceiling tile collapsed, she wrote a letter to Folmar and vacated the premises. Subsequent inspections verified the presence of significant mold growth and the office space required professional remediation. Capaci never returned to the premises. Capaci's office property was removed by Folmar and stored in a trailer. *See* Folmar's Trial Brief (C.14-29). The parties dispute the cause of the mold growth and who was responsible for it. The parties further dispute whether the premises were properly remediated, or made safe for reoccupancy, as well as the nature and extent of any loss to Capaci's personal property and

other alleged bodily injuries and income losses due to the interruption of her business.

The claims of Folmar against Capaci for breach of the lease were settled before trial by Capaci's insurance company. (C.971). Trial commenced on Capaci's counterclaims against Folmar for breach of the lease and for negligence and wantonness in the construction and maintenance of the premises. After four days of trial, near the conclusion of her case, Andra Capaci was called to the stand as a witness. (R.498)

After first confessing her nervousness on the stand (R.498), Ms. Capaci began answering questions about problems with water intrusion into the premises and her complaints about those leaks. During argument of counsel, Capaci volunteered a response. (R.506). At that point, the trial court warned her about volunteering information:

> The witness: *It was under duress.*
>
> The court: *Ms. Capaci.*
>
> The witness: *Yes?*
>
> The court: I *am going to warn you right now,* –
>
> The witness: *Yes.*

> The court: – *If you volunteer any information, I am going to terminate your testimony just like Dr. Lipsey's. Do you understand me?*[1]
>
> The witness: *Yes.*
>
> The court: *Listen to what this gentleman asks you, respond to the question.*
>
> The witness: *Yes. I am sorry, Your Honor. I am a little nervous.*
>
> The court: *I understand.*

(R.506-07)

As Ms. Capaci continued to testify, her answers at times continued to exceed the scope of the question or were otherwise non-responsive. (R.514-16, 525). The court would remind her of the question that was asked and instruct her to listen carefully to the question (R.516, 525-26). Objections on the grounds of hearsay were also sustained when she began to testify about what other people had said (R. 509, 513, 526, 530, 532).

At page 531, after she had begun to testify beyond the scope of the question, the court again sustained an objection and warned her about volunteering information. (R.531-32). She agreed to do so, admitting her nervousness. (R.532). At page 550, an

---

[1] The court had earlier terminated and stricken the testimony of plaintiff's expert, Dr. Lipsey, and instructed the jury to disregard it. (R.194-95).

objection was again sustained to an answer on the grounds that it exceeded the scope of the question. (R.550-51).

The cross-examination of Ms. Capaci begins at R.562. When she began to explain about something that had not been asked of her, the court told her that her own counsel could have her explain if need be, but that she should try to answer the questions. (R.564). She again apologized to the court, saying she was "nervous." (R.564). She also apologized to Folmar's counsel saying that she did not mean to disturb him. (R.564). Later, when she began to, testify before Folmar's counsel had finished his question, she again apologized, explaining that she was just nervous. (R.569-70).

As the cross-examination continued, the court reminded her on several occasions to answer the question, when she failed to do so. (R.580, 584, 585, 593).

At page 598, after she began testifying beyond the scope of the question, the court interrupted:

> The court: *Ms. Capaci.*
>
> The witness: *I'm sorry. I am just –*
>
> The court: *Ms Capaci, I am going to tell you one last time and this is absolutely your last warning. This trial will end the next time you volunteer an answer that is not requested for by the question. Do you understand that?*

The witness: *I will try to pay closer attention,*

The court: *No. Do you – okay, thank you.*

The witness: *I will try very hard to pay closer attention. If I am slow with my answers, it's because I'm thinking, okay?*

The court: *Being slow has not been the problem, Ms. Capaci.*

The witness: *Okay, I'm going to be slow.*

The court: *Listen to the question, please.*

The witness: *I'm going to be slow and think before I talk.*

(R.598-99).

At page 600, she was questioned:

Q: *You didn't hire anybody to move them?*

A: *I couldn't afford to, no.*

Q. *You didn't tell anybody to do it?*

A. *I couldn't afford to, no.*

The court: *Ms. Capaci*

The witness: *I said it wrong again. Oh, god, I am sorry. Jesus God, I am sorry.*

(R.600).

Later, Folmar's counsel began questioning the witness about certain tax returns prepared by a tax preparer for the years 2003 and 2004. (R.628-642;

Folmar Exs. 114, 138, 139). Counsel began asking her about the cost of certain office inventory listed on the schedules:

> Q: *In this return to the IRS, you represented the office sofa cost* $1304.00 *and that you got it on December 7, 2001, correct?*
>
> A. *Well, can I ask you – these are from 1999, 1999 figures here, 7/1999?*
>
> Q. *I am not arguing with you about it. I just want you to confirm that that's the representation that you made to the IRS.*
>
> A. *I don't understand it; I will be honest.*
>
> Q. *You don't have to understand it. I just want you to agree with me that this is the figure that is on your return to the IRS?*
>
> A. *I don't know.*
>
> Q. *You don't know. You can't see it there?*
>
> A. *I cross my heart and hope to die, I don't know. It says, 2004. I don't know where this came from. I don't know where Shep [tax preparer] got this. I didn't give it to him.*
>
> Q. *No, ma'am. I hadn't asked you any of that. I just want to know –*

(R.642-43).

At this point, the court stopped the cross-examination, dismissed the jury and then spoke to the lawyers and parties:

> The court: *I think I gave Ms. Capaci every leeway I could possibly give, perhaps maybe too much. She continually disregarded my instructions to respond to the questions. I hereby dismiss the case with prejudice, costs taxed to the plaintiff on this matter.*

(R.644).

An order was thereafter entered, dismissing the action with prejudice and taxing costs against Capaci. (C.1507). Costs were taxed against Capaci pursuant to a motion to tax costs, filed by Folmar, seeking some $25,503.78 (C.1448), which motion was granted the day after it was filed. (C.1506). The motion sought costs pursuant to Rule 54(d) and Rule 68, *A.R.C.P.* (C.1448). Capaci filed a Rule 59 motion to alter or amend the judgment, contending that Rule 68 was inapplicable (R.1511). This motion was denied. (C.1617).

STATEMENT OF THE STANDARD OF REVIEW

Dismissal for failure to comply with a court order under Rule 41(b), *Ala. R. Civ. P.,* is reviewed for abuse of discretion. *Jones v. Merrill Lynch Pierce Finner & Smith, Inc.,* 604 So.2d 332, 341 (Ala. 1991).

Review of an order taxing costs is reviewed for abuse of discretion. *Bundrick v. McAllister,* 882 So.2d 864, 866 (Ala. Civ. App. 2003).

SUMMARY OF ARGUMENT

An involuntary dismissal with prejudice under Rule 41(b), *A.R.C.P.,* for failure to comply with a court order, is a harsh sanction to be used only in extreme circumstances. Such a dismissal should be granted only where there is a clear record of delay, willful default or contumacious conduct by the plaintiff. Lesser sanctions, if available, should be adopted. The power of the court to dismiss an action under Rule 41(b) is circumscribed by the constitutional right to due process,

The Appellant Andra Capaci was guilty of no such willfulness or contumacious conduct in this action. On the witness stand, she answered the questions to the best of her ability but often was unable to confine her answers to the questions posed. Her inability to do so was not willful and did not warrant the sanction of dismissal. Lesser sanctions were available, such as a mistrial, the striking of any testimony that was non-responsive, or citation for contempt. The dismissal of Capaci's claims under these circumstances violated her due process rights and/or was otherwise an abuse of discretion and must be reversed.

Were this Court to sustain the dismissal of the action with prejudice, the award of costs against Capaci cannot be sustained. Folmar filed a motion to tax costs relying upon both Rule 54(d) and Rule 68, *A.R.C.P.* Rule 66 was not available as a basis for the award of costs because Folmar was a victorious

defendant and a judgment was not obtained by Capaci in an amount less than the sum offered. The trial court awarded all costs sought by *Folmar* one day after the filing of the motion. The basis for the award of costs cannot be determined. If the court awarded costs on the basis of Rule 68, which mandates the award of all recoverable costs, the court erred. The award of costs must therefore be reversed and remanded to the trial court with instructions to exercise its discretion under Rule 54(d) alone.

Moreover, certain of the expenses awarded to Folmar are not recoverable under Alabama law as costs. These expenses must be eliminated from any award of costs that the trial court may grant upon remand.

ARGUMENT

I.

THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING SUA SPONTE PLAINTIFF'S ACTION WITH PREJUDICE WHERE THE RECORD REFLECTS NO WILLFUL DEFAULT OR CONTUMACIOUS CONDUCT ON HER PART IN HER EFFORT TO ANSWER QUESTIONS ON THE WITNESS STAND.

Rule 41(b), *Ala. R. Civ. P.*, provides for the involuntary dismissal of an action upon "failure of the plaintiff to prosecute or to comply with these rules [of civil procedure] or any order of court." Involuntary

dismissal with prejudice under Rule 41(b) "is a harsh sanction and should be used only in extreme circumstances." *Smith v. Savage,* 655 So.2d 1022, 1024 (Ala. Civ. App. 1995) (quoting *Selby v. Money,* 403 So.2d 218, 220-21 (Ala. 1991)).Such a dismissal may be granted only "when there is a clear record of delay, willful default or contumacious conduct by the plaintiff." *Id.* (quoting *Selby v. Money, supra*); *see Ryder International Corp. v. State of Alabama*, 439 So.2d 162, 164 (Ala. Civ. App. 1983) (dismissal with prejudice, as sanction for failure to comply with court rule, is "drastic and should be ordered only in extreme situations involving willful or contumacious conduct."). "Where lesser sanctions are available, they should be tried." *Atkins v. Shirley,* 561 So.2d 1075, 1077 (Ala, 1990) (quoting *Marcoal, Inc. v. United Mine Workers of America,* 292 Ala. 567, 298 So.2d 6, 8 (1974)).

The power to involuntarily dismiss an action, with prejudice, under Rule 41(b), is circumscribed by the constitutional guarantee of due process. In *Societe Internationale v. Rogers,* 357 U.S. 197, 78 S.Ct. 1087 (1958), the U.S. Supreme Court held that dismissal of an action with prejudice, for failure of the plaintiff to comply with a pretrial production order, where that production would have violated Swiss penal laws, was not justified because the failure to comply was not due to any willfulness, bad faith or fault on the part of the plaintiff. 78 S. Ct. at 1096. The district court had dismissed the action under Rule 37(b)(2),

F.R.C.P., relating to the consequences of disobedience of an order as to discovery. *Id.* at 1093. The Court held that the provisions of Rule 37 had to be read in light of the Due Process clause of the Fifth Amendment. *Id.* at 1094. Citing to its own prior decisions in *Hovey v. Elliott,* 167 U.S. 409, 17 S. Ct. 841. (1897) and *Hammond Packing Co. v. State of Arkansas,* 212 U.S. 322, 29 S. Ct. 370 (1909), the Court observed that "there are constitutional limits upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Id.*

The Alabama Supreme Court has explicitly recognized these constitutional restrictions on the exercise of the power of dismissal under Rule 37. *See Wetherly v. Baptist Medical Center,* 392 So.2d 832, 836 (Ala. 1981) (recognizing "constitutional limitations" on Rule 37, as set out in *Societe Internationale,* and recognizing "willfulness" of plaintiff's conduct as "key criterion" to imposition of drastic sanction of dismissal under Rule 37).

Although the *Societe Internationale* decision involved the power of dismissal under Rule 37, the same constitutional restrictions circumscribe the powers of dismissal under Rule 41(b). *See Societe Internationale*, 357 U.S. at 208, 78 S. Ct. at 1093 (noting that Rule 41 "cannot easily be interpreted to afford a court more expansive powers than does Rule 37"). In *McCollum v. Birmingham Post Co.,* 259 Ala. 88, 65 So.2d 689 (1953), the Alabama Supreme Court

recognized the constitutional limitations upon the court's inherent power to dismiss an action for disobedience of a court order. The Court held that the dismissal of a libel suit, due to the plaintiff's failure to submit to a perpetuation of his testimony in collateral proceedings, was void as a denial of due process of law under the Alabama and U. S. Constitutions, where there had been no default by the plaintiff in the prosecution of his action. 65 So.2d at 695. Relying upon *Hovey v. Elliott* as the "leading case," the Court observed.

> "Courts have no inherent power to punish contempt by denying a hearing to the contemnor, in striking his pleadings or entering default judgment or dismissal against him, since one of the fundamental conceptions governing the court of justice is condemnation only after a hearing, and an order of this nature denying the condemnor a right, as distinguished from a favor, is void for want of due process of law in violation of the Fourteenth Amendment to the Federal Constitution or a comparable provision of the applicable state Constitution."

65 So.2d at 694 (quoting *Annot.*, 14 A.L.R. 2d 589, § 5).

Cases from the old Fifth Circuit have also held that dismissal under the comparable federal Rule 41(b), *F.R.C.P.* can only be justified where there is "a clear record of delay or contumacious conduct by the plaintiff," *Durham v. Florida East Coast Railway Co.*,

385 F.2d 366, 368 (5th Cir. 1967), and where "lesser sanctions would not serve the best interest of justice." *Pond v. Brannif Airways, Inc.*, 453 F.2d 347, 349 (5th Cir. 1972) (lesser sanctions will normally suffice, except in the most "flagrant circumstances"); *Flaksa v. Little River Marine Construction Co.*, 389 F.2d 885, 888 (5th Cir. 1968), *cert. denied,* 392 U.S. 928, 88 S. Ct. 2287 (1969) (dismissal of action with prejudice is drastic remedy to be used only in extreme situations, "as the court has a wide range of lesser sanctions"). The holdings of these cases have been expressly adopted by the Alabama Supreme Court. *See Smith v. Wilcox County Board of Education,* 365 So.2d 659, 661 (Ala. 1978) (citing *Durham, Pond* and *Flaksa*).

Consistent with the above principles, the appellate courts in this state have consistently reversed dismissals of actions with prejudice under Rule 41(b) in the absence of a clear record of willful default or contumacious conduct on the part of the plaintiff in the prosecution of the case or failure to obey a court order. *See Atkins v. Shirley,* 561 So.2d 1075 (Ala. 1990) (dismissal for want of prosecution for failure to appear at pretrial docket was abuse of discretion); *Riddlesprigger v. Ervin,* 519 So.2d 486 (Ala. 1987) (dismissal for want of prosecution of case pending for six months was improper where plaintiff's conduct was not dilatory or contumacious); *Wetherly v. Baptist Medical Center,* 392 So.2d 832 (Ala. 1981) (trial court abused its discretion in imposing sanction of dismissal for plaintiff's failure to comply with order to

answer interrogatories where he was physically and mentally unable to answer them); *Smith v. Wilcox County Board of Education,* 365 So.2d 659 (Ala. 1978) (dismissal for want of prosecution, after several years of inactivity, was abuse of discretion where record did not reflect plaintiff was deliberately proceeding dilatorily); *Smith v. Savage,* 655 So.2d 1022 (Ala. Civ. App. 1995) (reversing dismissal of action for want of prosecution based on pro se plaintiff's failure to appear at trial due to flat tire); *Ryder International Corp. v. State,* 439 So.2d 162 (Ala. Civ. App. 1983) (trial court abused its discretion in dismissing taxpayer's appeal with prejudice because of failure to comply with local court rule requiring filing of complaint setting forth issues presented for review where error was accidental).

The trial court's dismissal with prejudice of the claims of Ms. Capaci, sua sponte, cannot be sustained under the foregoing principles. The record fails to establish any "willful default" or "contumacious conduct" on the part of Ms. Capaci. She did not, at any time, willfully or intentionally refuse to answer any question posed to her. Her failure to comply with the court's repeated admonitions to answer the question was not willful. From the record, it is apparent that her self-confessed anxiety repeatedly interfered with her ability to listen to the questions and respond succinctly.

Lesser sanctions were available. The trial court could have simply struck, and continued to strike, testimony that was non-responsive. It could have held

the witness in contempt of court. Finally, it could have granted a mistrial. The extreme measure of dismissal with prejudice was not necessary in order to do justice in this case.

The court's dismissal of the case with prejudice also came without warning that such a consequence might follow from Ms. Capaci's non-responsive answers. The court warned her that he would "terminate her testimony" if she continued to volunteer information. (R.506). He warned her that the "trial will end the next time you volunteer an answer that is not requested for by the question." (R.596). He did not warn her or her counsel that he would sua sponte dismiss the action with prejudice. Such lack of notice is a relevant factor in assessing the propriety of the court's discretion in dismissing the action. *See Hodge v. R&R Movers,* 716 So.2d 740 (Ala. Civ. App. 1998) (dismissal of action for failure to file certificate of readiness where plaintiff received no notice of requirement for filing certificate and no notice of setting for dismissal).

In summary, the action of the trial court, in sua sponte dismissing the action with prejudice, violated the Due Process rights of Ms. Capaci to a hearing on the merits of her claims and/or was otherwise an abuse of discretion of the trial court's power under Rule 41(b).

II. IF THE JUDGMENT IS AFFIRMED, THE TRIAL COURT' S AWARD OF COSTS MUST BE REVERSED AND THE CAUSE REMANDED WITH INSTRUCTIONS TO AWARD COSTS PURSUANT TO THE COURT'S DISCRETION UNDER RULE 54(d) AND NOT PURSUANT TO RULE 68

In the event this Court were to affirm the action of the trial court in dismissing the action with prejudice, the costs awarded to Folmar in this action cannot be sustained. In its post-trial motion to tax costs, Folmar sought, and, the day after motion was filed, was granted some $25,503.78 in costs. (C.1448, 1506). Folmar relied upon Rule 54(d), *A.R.C.P.*, as the prevailing party, as well as Rule 68, *A.R.C.P.* on the basis of an offer of judgment made on July 26, 2006. (C.1448-50). As argued below, Rule 68 provides no authority for the award of costs in this case. Because the award of *all* recoverable costs is *mandatory* under Rule 68, rather than *discretionary* with the trial court, as it is under Rule 54(d), and because the trial court's order fails to reflect whether the award of costs was made pursuant to Rule 54(d) or Rule 68, it is impossible to know whether the court exercised its discretion in the award of costs under Rule 54(d) or determined such costs were mandatory under Rule 68. A remand is therefore necessary for the court to properly exercise its discretion under Rule 54(d).

A. Rule 68 Does Not Provide A Basis For An Award Of Costs Where The Plaintiff-Offeree Loses The Case And Obtains No Judgment Against the Defendant-Offeror.

Rule 68, *A.R.C.P.*, provides a basis for an award of costs only when "the judgment finally obtained by the offeree is not more favorable than the offer." The Alabama Supreme Court has construed this language to mean that the offeree must obtain a judgment for an amount less favorable than the offering party's settlement offer. If, instead, the plaintiff-offeree loses the case entirely and does not obtain a judgment against the defendant-offeror, Rule 68 provides no basis for an award of costs. *Ex Parte Waterjet Systems, Inc.*, 758 So.2d 505, 508-09 (Ala. 1999). In the words of the Supreme Court, "the plain language of Rule 68 states that a final judgment in the plaintiff-offeree's favor for an amount less than the amount of the offer is a prerequisite to the plaintiff-offeree's liability for costs." *Id.* at 508; *Accord Judd v. Sandefer*, 852 So.2d 164, 165 (Ala. Civ. App. 2002) ("Waterjet does not permit the recovery of costs by a victorious defendant.").

Capaci did not obtain a judgment against Folmar in an amount less than the Rule 68 offer. Rather, Folmar prevailed and obtained a dismissal of the action with prejudice. Therefore, costs may not be taxed against Capaci on the basis of Rule 68.

B. The Award Of Costs Must Be Reversed And Remanded For Further Proceedings For Reconsideration By The Trial Court On The Basis Of Rule 54(d) Alone.

Under Rule 68, if the offeree of an offer of judgment rejects the offer, but later obtains a judgment that "is not more favorable than the offer, the offeree *must* pay the costs incurred after the making of the offer." (emphasis added). The language of the rule is mandatory. *Adkinson v. Long*, 559 So.2d 55, 58 (Ala. Civ. App. 1990). Rule 68 "limits the customary discretion afforded to the trial court with respect to cost allocation when an offer of judgment has been rejected." *Ennis v. Kittle*, 770 So.2d 1090, 1092 (Ala. Civ. App. 1999). *See Honeycutt ex rel. Martin v. Sherman*, 806 So.2d 401 (Ala. Civ. App. 2001) (holding that, under Rule 68, plaintiff was entitled to recover all properly taxable costs that had accrued).

In contrast, under Rule 54(d), costs are to be allowed to the prevailing party "unless the court otherwise directs." Thus, the trial court retains authority to use its discretion to deny costs or to allocate costs differently. *Ennis v. Kittle*, 770 So.2d 1090, 1091 (Ala. Civ. App. 1999).

In the present case, the trial court, one day after Folmar's motion was filed, entered a one sentence order granting the motion. (C.1506). From the record, it cannot be determined on what basis the trial court awarded the costs. If it followed the mandatory

provisions of Rule 68 in awarding costs, it erred. The award of costs must be reversed and the cause remanded to the trial court to review the motion to tax costs under the appropriate discretionary standards of Rule 54(d).

III. CERTAIN COST ITEMS AWARDED TO FOLMAR WERE BEYOND THE TRIAL COURT'S DISCRETION UNDER RULE 54(D) AND MUST BE EXCLUDED

A. Expert Witness Fees

The fees paid by a litigant to compensate expert witnesses is not recoverable as costs under Alabama law. *Bundrick v. McAllister,* 882 So.2d 864, 867-68 (Ala. 2003).

Folmar's motion to tax costs included the following items representing payment of compensation to experts:

Date	Description	Amount
6/14/06	Deposition fee to Driskell Environmental Consultants for Capaci's expert Brent J. Driskell	$ 625.00
7/15/06	Deposition fee to Capaci's expert, David C. Flettrich, for deposition	$1,463.33
9/20/06	Consultant fee for expert Dr. Hung Cheung to oppose Capaci's expert, Dr. Shoemaker	$ 492.50

9/25/06	Expert witness fees for consultation with Roy Acord at Service Master[2]	$ 75.00
12/4/06	Investigation services by Cook's Claim Services, Inc.	$ 124.80
2/28/07	Witness fee payments to Roy Acord and ServPro	$ 1,700.00
3/7/07	Witness fee payment to Cook's Claim Service, Inc.[3]	$ 2,295.18
		$ 6, 775.81

(C.1458-61). These costs were improperly awarded.

B. Private Investigator Expenses for Service of Subpoenas

Alabama law does not support the taxing of payment of expenses incurred by private investigators undertaking the service of various subpoenas. *Bundrick v. McAllister,* 882 So.2d at 868.

A number of items on Folmar's cost bill included expenses for service of subpoenas by a private process server, including the following:

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[2] Roy Acord was identified as Folmar's expert at C.412.

[3] Richard Gardner of Cook's Claims Service was identified as Folmar's expert at C.371.

Date	Description	Amount
3/7/05	Service of non-party subpoena on Dr. Dennis Occhipinti	$ 40.00
3/7/05	Service of non-party subpoena on American National Property and Casualty Insurance Company	$ 55.00
4/11/05	Service of non-party subpoenas on Ronald Updegraff, BC/BS of Lousiana and Louisiana Department of Insurance	$ 120.00
4/11/05	Service of non-party subpoenas on Dr. Shamsnia and Dr. Rovena	$ 115.00
5/16/05	Service of non-party subpoena on Louisiana Real Estate Commission in Baton Rouge	$ 50.00
5/20/05	Service of non-party subpoena on Slidell Memorial Hospital	$ 75.00
5/30/06	Service of subpoenas to Greater New Orleans Home Service and IHLAB	$ 80.00
6/20/06	Additional fee for service on IHLAB and Greater New Orleans	$ 75.00
1/18/07	Service of four subpoenas in Metairic, Harahan and New Orleans, Louisiana	$ 200.00
		$ 810.00

(C.1456-61). These costs were improperly awarded.

C. Online Research

Folmar's cost bill includes expenses for "online research," totaling some $1,531.63. (C.1456-61). There is no authority under Alabama law for the recovery of such expenses in an award of costs.

D. Mediation Fees

Folmar's cost bill includes mediation fees as follows:

Date	Description	Amount
9/9/05	Mediation fees	$ 447.22
12/6/06	Mediation fees	$ 567.48
		$ 1,014.70

(C.1457, 1460). There is no authority under Alabama law for the taxation of such fees under Rule 54(d).

E. Summary

In summary, in the event this Court affirms the judgment of dismissal below, certain costs must be eliminated as a matter of law because they are not taxable as costs under Alabama law. These costs total $10,132.14.

CONCLUSION

For all of the above reasons, Appellant Andra Capaci respectfully submits that the order of dismissal with prejudice, entered sua sponte against her

on her counterclaims, should be reversed and the matter remanded to the trial court for a new trial. Alternatively, the award of costs against her should be reversed and remanded for further proceedings for the recovery of costs under Rule 54(d), *A.R.C.P.* alone. Certain costs awarded must also be eliminated as a matter of law.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 11th day of October, 2007, served a copy of the foregoing on counsel for all parties to this proceeding, by depositing same in the United States mail, properly addressed and first class postage prepaid:

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